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Comité Maritime International

Colloquium

on the

Hamburg Rules

Chairman: THE LORD DIPLOCK

VIENNA

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INTRODUCTION

THE LORD DIPLOCK

President,
Ladies and Gentlemen,

You may remember that a little over two years ago the CMI held a Seminar at Aix-en-Provence on the apportionment of risk in maritime transport. The topic was dealt with generally, considering such matters as the apportionment of risk between shipowners and cargo owners, between ships in collision, between ship and land installations and of course, particularly in the insurance market between cargo insurance, P & I insurance and Hull insurance. We then concentrated on the practical aspects of the apportionment of risks and in so doing considered the following items. What was the most economical way of approaching these various kinds of risks so that the total cost which has to be borne can be reduced to the minimum? What was the most economical way of spreading the risk between the various insurance interests? What organisation of the insurance market and methods of spreading the risks would involve least administrative cost?

The situation at the time of the Aix-en-Provence Seminar was that the Hague Rules covered most of the world so far as apportionment of risk between shipowners and cargo owners was concerned in respect of voyages covered by bills of lading. The Visby Protocol which is based on the same regime as the Hague Rules was not in force and the Hamburg Rules were still a draft being considered by UNCTAD.

Today the position has changed. What confronts those involved in maritime transport is a choice between two regimes for the apportionment of risk between shipowners and cargo owners. One of them, the Hague Visby Rules, is the basis upon which maritime trade has been conducted and the insurance market organised and operated for the last 50 years. Though far from perfect we have long experience of those Rules and know more or less where we stand. The other choice is the Hamburg Rules, new in design, different from the Hague Visby Rules and broadly incompatible with them in two main respects: first, the scope of application of the Hamburg Rules, in time, geographically and the type of contract to which they are to apply; and second, the manner in which risk is apportioned.

The task which faces this Colloquium is very different from that which faced the Seminar in Aix-en-Provence. We are here to consider the practical consequences on maritime trade of the adoption of the Hamburg Rules. How are they going to affect shipowners and shippers? How will they affect the organisation of the insurance market throughout the world? What effect are they going to have on documentation, what effect are they going to have upon recourse actions by cargo underwriters and P & I underwriters? What are the economic consequences going to be if the Rules are adopted? What are the legal conundrums which will arise if the new Rules are widely ratified?

The question to which I hope we are really going to direct our minds is what is the effect of all this going to be upon the industry overall. Will it increase or reduce costs or is it going to leave things very much the same? This is a practical problem and I hope that throughout this Colloquium we shall be concentrating our minds on what the practical effect is going to be. If I may use an English expression, "it is no good crying over spilt milk". It is no good looking at the Hamburg Rules and saying:— "Well, it would have been better if that particular article had been drafted this way instead of that way. Why didn't they do this, why didn't they do that?" It is no good our discussing the Hamburg Rules on those lines because they are here. We cannot alter them, we have got to live with them as they are and not as we might have liked them to be if we had had a bigger say when they were being drafted. We really have in the maritime world a stark choice between two alternatives. One is to accept the Hamburg Rules, to let them replace the Hague Visby Rules and to consider, if that is done, what is the most practical way to organise the affairs of shipowners, cargo owners and various insurance interests to make the Rules work in such a way that, even if they do not reduce the overall costs, they will at least not increase them

by any substantial amount. The other choice is to leave the two competing and incompatible systems working together. Is that something with which we can live? Suppose we came to the conclusion that the Hamburg Rules would add substantially to the overall cost of maritime transport, a cost which will ultimately be met by the consumer, then would it be possible practically for the two systems to coexist? It may be that the Hague Visby Rules would be retained by the industrial and maritime nations and the Hamburg Rules adopted by a majority of developing nations.

When we consider the question of coexistence it must be remembered that, at any rate for some years, the two systems will have to coexist until governments decide whether or not to ratify the Hamburg Rules. What the decision is going to be I have at this stage no idea. It may well be that at this Colloquium we will not reach a consensus of opinion, but we shall, I hope, at any rate go back more conscious and more understanding of what the practical consequences are going to be of either choice.

Now let me tell you very briefly what the plan is to enable you to come to an informed opinion. I am sure that it is not going to be an easy task but, at any rate, I hope that the procedure that we have laid down as the basis for reaching conclusions on the practical problems flowing from the two choices facing us will prove helpful.

On Day 1 you will hear papers given by the following speakers. Mr McGovern will look at the problems from the shipowners' point of view and then Mr Schilling will cover the shippers' attitude. We will then hear the views of the insurers, both cargo and P & I, in the persons of Mr Schalling and Mr Goldie both of whom will concentrate on the practical effects, not the interesting juridical views that one could form about this or that part of the Hamburg Rules. One of the things one wants to bear in mind when listening to them is to consider what effect, if any, the Hamburg Rules will have on the insurance market. Is there going to be a tendency towards insured bills of lading, removing or shifting the balance of the insurance from the cargo insurance market to the liability insurance market? Is there going to be a tendency to restrict liability? Is the market going to remain very much as it is? The day will end with a paper given by Mr Justice Mustill who will deal with some of the legal arguments which are likely to arise out of the more ambiguous provisions in the Rules. These will be considered by you all in your discussion Groups on Day 2.

I now propose to go through the Hamburg Rules in a very summary way in order to suggest to you what are the problems which appear to me to be those on which we shall need to concentrate our thoughts. It seems to me that the Hamburg Rules do produce a coherent and consistent legal system. The system may be good or it may be bad, but one wants, I think to look at it as a whole because there is a philosophy that one can discern in it. Further, it should be considered in comparison with the Hague Rules because it is on that system, which is both consistent and coherent, that maritime transport and its insurance is organised today.

More specifically I would direct your minds to the following matters.

- (1) Scope of application of the Hamburg Rules: this matter, which will be dealt with by Group 5, seems to me to have three aspects. First, the Rules apply to all contracts of carriage except charterparties in contrast with the Hague Visby Rules which apply only to contracts of carriage which are covered by bills of lading. Further, there is no exception for particular goods as there is in Article 6 of the Hague Rules so that on the face of it the Hamburg Rules will apply to roll-on roll-off ferries. When I take my car across the Channel, if I understand it correctly, I am entitled to demand the bill of lading and all the fifteen particulars which are required in the Hamburg Rules. One problem I think one is going to find is the spread of application to other contracts of carriage. The second aspect is the goods to which the Rules will apply including all deck cargo and live animals. Finally, there are the juridical problems which arise as a result of their application not only to outward cargo but also to inbound cargo which may raise some interesting questions of recognition or jurisdiction and of application of the proper law.

- (2) The period of liability: under the Hamburg Rules the carrier is liable for the goods so long as they are in his charge. Although that seems to make sense it may present some problems at loading and discharge in establishing when that liability commences and ceases. It seems to me that this is a problem which is going to be more difficult than it was under the Hague Visby Rules. Where complications do arise is in what seems to be a difficulty of application in the case of through carriage, a matter which is to be dealt with by Group 1.
- (3) The next matter is of course the question of the basis of liability. The Hague Rules make sense historically. The duty lay upon the shipowner to use due diligence before loading to make the ship seaworthy and equip it for the voyage. Misfortune risks and human error risks on the voyage are allocated to the cargo owner and his insurer in consequence of the famous exceptions for error in navigation, management of the vessel and fire. The Hamburg Rules place the liability in this way. The carrier in order to escape liability must prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. This is a very broad definition of apportionment of risk. Indeed, speaking as one who has been a judge for a good many years, I think that given that very broad definition I could decide almost every case exactly as I liked. There is very wide scope for variation in application and I am by no means sure that it is narrowed rather than widened by the "Common Understanding" in Annex II to the Rules, that the liability provision is based on the principle of presumed fault or neglect. I think that given the "Common Understanding" and the definition there is wonderful scope for variation of application. In short, the Hamburg Rules transfer the liability for human error from cargo to the shipowner and that is going to have some practical results more especially in the areas of recourse actions, general average and limitation of liability.
- (4) The next point is the onus of proof. My own experience as a judge has been that by the time the matter has got to court the onus of proof at common law is seldom decisive of the case, but it may well be at the earlier stage, when one is negotiating a settlement, that onus of proof has a much wider effect. But there is one respect in which even as a judge I think onus of proof may have considerable consequences and that is in relation to Article 5(7) which deals with apportionment when loss, damage or delay is partly caused by fault or neglect of the shipowner and partly by another cause. I think that is going to cause a good deal of difficulty. Finally, from a practical view point what effect is this liability regime going to have upon the cost of insurance? Is cargo insurance, whether by cargo insurer or by a P & I insurer, bound to cost more?
- (5) With regard to limitation of liability which will be dealt with by Group 3, the Hague Rules principles are virtually unchanged except as respects the circumstances in which the owner is debarred from limitation. The Hamburg Rules, whilst imposing greater liability on the shipowner provide that he may, in almost all circumstances, limit his liability. The provision on delay I will not pause on but I see problems in the area of through carriage which is going to be dealt with by Group 1.
- (6) There is the change in documentation, which is to be dealt with by Group 4. The bill of lading is to be issued on demand. Under any contract or charterparty there is provision for reservations which I strongly suspect will lead to standard terms in bills of lading such as "no reasonable means of checking".
- (7) The Hamburg Rules contain provisions on jurisdiction, one of the matters to be dealt with by Group 6. The Hague Visby Rules are silent about jurisdiction leaving it as a matter to be dealt with by the private international law of the various countries in which suit might be brought. The Hamburg Rules confer on the plaintiff a choice of fora in which suit may be brought based on either the defendant's principal place of business, the agreed forum or the port of loading or discharge, or the place where the contract was made. That is going to present problems particularly with regard to some existing Conventions such as the 1968 EEC Convention and further, when one bears in mind the very wide scope of variation in application it appears to me to

provide an opportunity for forum shopping which is one of the things which it is the purpose of these Conventions to avoid. Much the same points apply to the provisions on arbitration contained in the Rules.

- (8) Finally, the denunciation provisions require countries which ratify the Hamburg Rules to denounce the Hague Visby Rules but leaves a space of five years after the Hamburg Rules come into force and that is the period during which it is contemplated that these two conflicting and incompatible schemes will be simultaneously in force.

I am sorry to have taken your time in going over the Hamburg Rules in this summary form to give some indication of my own view as to where the problems may lie. The choice, whether to adhere to the Hamburg Rules or whether to let the two systems continue side by side is a choice which all our governments will have to make in the fairly near future. This Colloquium will have served its purpose if we manage to discover and reach some consensus of opinion, informed opinion of those actively engaged in maritime trade and who understand the practical problems, on the practical consequences on maritime trade of the choice made, so that our governments will make that choice with the assistance of those of you represented here who recognise that what we are all after is to discover the most economic way of apportioning and covering the risks which are an inevitable feature of sea transport.

THE PRACTICAL AND ECONOMIC EFFECTS OF THE HAMBURG RULES FROM THE POINT OF VIEW OF A SHIPOWNER

Mr Niall McGovern

I have been asked to comment from the point of view of a shipowner on the practical and economic effects which would result from the substitution of the Hamburg Rules for the Hague Visby Rules. As others will discuss the matter from different points of view I must try to avoid trespassing on territory covered by them.

The principal changes in the law governing carriage of goods by sea which the substitution of the Hamburg Rules for the Hague Visby Rules would bring about are as follows:—

- (1) The defence of error in the navigation or in the management of the ship is no longer available.
- (2) The period of responsibility has been extended.
- (3) The limits of liability have been raised.
- (4) The time limits for notice of loss or damage and for bringing suit have been extended.
- (5) There is joint and several liability with "Carriers" who may neither own nor operate ships.
- (6) There is a specific liability for delay.
- (7) The Rules apply to deck cargo, live animals, and non-commercial cargoes.
- (8) The burden of proof has been reversed.

Just how radical these changes will be will depend to a large extent on how the Hamburg Rules are interpreted in the various jurisdictions in which they come under judicial scrutiny. We shall be speculating on this at this Colloquium, and I suspect for some time to come.

NAUTICAL FAULT

The complete elimination of the defence provided to carriers by Article 4.2 (a) of the Hague Rules 1924 will probably prove to be the most serious cause of increased costs for shipowners. As everyone knows, the carrier under the Hague Rules is not responsible for "loss or damage arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship". The defence of nautical fault arises mainly in cases of collision or stranding. In the event of a total loss of the vessel the concentration or risk is not under the Hague Rules focused upon the carrier, but is spread amongst the various cargo underwriters who insure the individual consignments.

It is well to remember that the value of the cargo laden on board a modern ship usually far exceeds the value of the ship itself. In Europe the cost of building a vessel of 25,000 deadweight tons today would be between £9 and £10 million. Her value at any given time will be influenced very largely by market conditions. Obviously the value of 25,000 tons of cargo will vary with the type of cargo, but if we use the limitation figures in Article 6 of the Hamburg Rules as a measure the value of the cargo would lie between £14 million and £42 million, depending on whether one used the limit per package or per kilogramme. The amounts at risk on one keel in carriage by sea are considerable. A total loss of ship and cargo because of collision or stranding very often involves a degree of nautical fault for which, under the Hamburg Rules, the carrier will be liable. Only time will tell whether this

radical re-allocation of risk will prove to be a benefit or a hindrance to commerce. One thing is clear. It will substantially increase the cost of liability insurance for shipowners.

PERIOD OF RESPONSIBILITY

I suspect that the extension of the period of the carrier's responsibility will not pose great problems for shipowners because in fact tallies taken at the ship's side during loading or discharging are seldom sufficiently accurate to provide a defence if the outturn on delivery from the quay or transit shed reveals shortage or damage. In practice shipowners tend to rely on the receipts they receive on delivery of the cargo from the quay or transit shed to establish the quantity and condition of the cargo delivered. It is only when there is the clearest evidence that the loss or damage arose subsequent to discharge and prior to delivery that shipowners are able to defend a claim for loss or damage successfully under the Hague Rules.

The practice in relation to receiving or delivering cargo at ports varies. In some ports cargo is received into and delivered from transit sheds which are the property of the Harbour Authority which leases them formally or informally to various stevedores or ships agents. In other ports, goods are delivered to Master Porters or other semi-official agencies quite unconnected with the shipowner prior to loading or subsequent to discharge.

Article 4 of the Hamburg Rules may create one practical problem for shipowners. I think it is more likely to arise at the port of discharge than at the port of loading. Presumably the carrier at the port of loading will not take the goods in charge until he is ready to do so, and thus he himself will be in a position to determine when the period of responsibility for the goods commences. The position may be somewhat different at the port of discharge because the carrier then has the goods in his charge, and to some extent depends on the co-operation of the receiver of the goods to bring the period of responsibility to an end. Because importers, unless discouraged, tend to use transit sheds as a convenient store, Harbour Authorities and other warehousemen have found it necessary to charge rent, either from the date of entry of the goods into the store or after the lapse of a free period. In some ports the shipowner or his agent is responsible for the default of the importer in the matter of quay rent. To meet this situation bills of lading frequently contain a clause on the following lines:—

“The carrier may commence discharge immediately upon arrival of the ship and continue day and night, Sundays and holidays included, any custom of the port notwithstanding. The goods shall be taken from alongside the ship by the consignee or receiver who shall pay all dues, including tonnage and shed dues, and all landing charges on the goods, and the carrier shall not be responsible for delivery to marks or numbers. If the consignee or receiver fails to take the goods from alongside as and when the same are discharged, the carrier, his servants or agents, shall be at liberty but shall not be bound to land the same or put them into craft or store them in any place whatsoever at the risk and expense of the owners of the goods, and shall thereby fully discharge the carrier's obligation hereunder to deliver goods, and the carrier shall have a lien upon the same for all costs and expenses incurred thereby”.

Article 4.2(b)(ii) of the Hamburg Rules provides that the carrier may deliver the goods by placing them at the disposal of the consignee in accordance with the contract. In the case of a bill of lading containing a clause on the lines set out above, would the carrier have delivered the goods in accordance with the contract by putting them into craft or storing them at the risk and expense of the owners of the goods if the consignee or receiver failed to take the goods from alongside as and when discharged? It has been suggested that clauses such as that which I have mentioned will not be permitted under the Hamburg Rules. If this is so, shipowners may have a serious problem at ports of discharge in dealing with importers who are reluctant to take prompt delivery of their goods.

LIMITS OF LIABILITY

The cumulative effect of the limits, coupled with the deletion of the defence of nautical fault, probably will have the effect of making it necessary for shipowners to invoke

in future, more often than now is the case, the overall limit of liability contained in the Limitation Convention of 1976. I have suggested that the cargo laden on a ship of 25,000 deadweight tons could be valued between £14 million and £42 million. If one makes the reasonable assumption that the limitation tonnage of such a vessel would be 16,000 tons, (i.e. the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex 1 of the International Convention on Tonnage Measurement of Ships 1969), the overall limit of liability for property damage, including cargo claims, would be £1.8 million approximately calculated as follows:—

500 tons	...	...	...	...	...	...	167,000 units of account
15,500 tons X 167	...	...	...	...	...	...	2,588,500 units of account
16,000 tons	...	...	...	...	...	...	2,755,500 units of account
							@ .66 = £1,818,630

The fact that the limit of liability for loss or damage is different from the limit of liability for delay in delivery may raise some practical difficulties if there are claims for loss or damage from the shipper, and for delay from the consignee, particularly as Article 6.1(c) provides that the aggregate liability of the carrier shall not exceed the limit for total loss. The Article on jurisdiction, Article 21 of the Hamburg Rules, is cast so wide that the shipowner could face an action by the shipper at the port of loading for loss or damage, and by the receiver at the port of discharge for delay, or indeed one could have an action by either at any port in any contracting state in which the vessel may be arrested. Shipowners may be faced with some interesting decisions on whether or not to lodge the limit of liability and where to lodge it.

NOTICE OF LOSS AND TIME LIMITS

No one would suggest that the extension in time for notification and for instituting suit for which the Hamburg Rules provide is a serious problem, but I believe it is a move in the wrong direction. The carrier’s unqualified receipt for the goods is prima facie evidence of delivery to him in apparent good order and condition immediately the receipt is signed. A clean receipt for the goods on delivery by him apparently will not become even prima facie evidence of delivery in apparent good order and condition until the day after it is signed.

Timely notification of claims is very important. Frequently it is necessary to interview ship’s personnel, and to inspect the ship’s records when a claim is submitted. The sooner a shipowner is notified of a claim the better are his chances of ascertaining the facts which will enable him to handle it properly. As there is seldom any problem in extending time for suit by agreement between the parties it is difficult to see the necessity for the extension of the time limit by one year. The memory of witnesses is notoriously fallible. It is difficult enough to get evidence twelve months after the event. To extend the time for suit to two years magnifies this difficulty.

JOINT AND SEVERAL LIABILITY OF “CARRIER” AND “ACTUAL CARRIER”.

In the major liner trades, break-bulk shipment has largely been replaced by shipment in container. Major exporters can fill a container with their products, but there are many shippers of general cargo whose volume of traffic at any given time is insufficient to fill a container. This has led to the growth of the practice known as groupage whereby the shipments from many small shippers bound for the same port are grouped in a container. Groupage is frequently done by forwarding agents who neither own nor operate ships. The forwarding agent obtains from a shipowner whose ships are operating a container liner service between ports A and B an empty container into which he packs many small parcels of cargo destined for port B which he receives from various shippers.

Very often the shipowner quotes the forwarding agent a fixed price for shipping the container from Port A to Port B regardless of the contents. The forwarding agent receives the goods for shipment, stows them in the container, issues his house bill of lading for each consignment to each shipper, and charges each shipper a rate of freight sufficient to provide

him with a profit after discharging his expenses, including the ocean freight payable to the shipowner. The rate charged by the forwarding agent usually varies with the commodity.

The forwarding agent delivers the full container to the shipowner who issues to the forwarding agent a transport document, frequently a non-negotiable bill of lading or waybill, on which the forwarding agent is shown as the shipper and his agent at the port of destination is shown as the receiver. When the goods arrive at Port B the container is delivered to the consignee or receiver named in the transport document who then proceeds to unpack the container and deliver the various consignments stowed therein to their respective destinations.

The impact of the Hamburg Rules on groupage could be considerable. It seems to me that in the circumstances outlined above the forwarding agent is the "Carrier" within the meaning of Article 1.1, and the shipowner is the "Actual Carrier" within the meaning of Article 1.2. Article 10.4 provides that where and to the extent that both the Carrier and the Actual Carrier are liable their liability is joint and several. The carrier's assets may be very insubstantial and thus cargo is likely to press the claim against the shipowner (Actual Carrier). The claim under the Hamburg Rules may be one for which the Actual Carrier would not be liable under the Hague Visby Rules. Suppose the forwarding agent, (Carrier), by contract had agreed to a date of delivery which in all the circumstances might be totally unrealistic. The shipowner receiving the container from the forwarding agent might have no knowledge of any such arrangement with the shipper, but might nevertheless find himself bound by such an agreement as it would not fall within the exception contained in Article 10.3 which refers only to special agreements under which the carrier assumes obligations not imposed by the Convention, or waives rights conferred by the Convention. Furthermore, if the forwarding agent had notice of the dangerous character of some of the goods in the container, but failed to pass on such information to the shipowner, the shipowner who is the Actual Carrier might well find himself bound by constructive notice of the dangerous character of the goods. If that container was loaded under deck in a cellular ship there would be only very limited access to the contents during the voyage.

These are matters which perhaps should be more fully discussed tomorrow, but as the provisions of the Hamburg Rules to which I have referred seem to place in jeopardy the continuation of a practice which presumably is convenient for the shippers of small lots of general cargo, and for shipowners operating liner services with container ships, I felt I should refer to them.

DELAY

It seems fairly clear that shipowners will be wise to insert a date for delivery in the bill of lading, because unless they do so they will have to depend on the uncertainty of a legal decision relating to "reasonable time". It seems to me that shipowners could avoid this uncertainty by stating a definite date for delivery in the bill of lading. In doing so they should give themselves a very generous margin. The Rules do not appear to contain anything which says that the time stipulated must be reasonable. Obviously this will be a matter for negotiation between Liner Conferences and Shippers Councils. I hope that this will become an area of non-competition among shipowners, because they will have to bear in mind in fixing a date for delivery that through the oversight of an independent contractor, (i.e. a stevedore), packages can be discharged at the wrong port. The time required to get such a package to the correct port of discharge very often depends on the efficiency of the Port Authority at the port at which it was landed, the customs formalities required before the goods can be reshipped, and of course, the frequency of sailings from the port to the proper port of discharge.

GOODS

(a) Live Animals

Article 1(c) of the Hague Rules 1924 in defining goods specifically excludes live animals. Article 1.5 of the Hamburg Rules specifically includes live animals in the definition of goods. Article 5.5 of the Hamburg Rules contains what purports to be exceptions to the carrier's liability in respect of live animals in that there is a presumption that the loss,

damage or delay was caused by "special risks inherent in that kind of carriage" if the carrier proves that he complied with any special instructions given to him by the shipper respecting the animals, and further proves that in the circumstances of the case the loss, damage or delay could be attributed to such risks.

Fortunately the carriage of live animals by sea does not form a large proportion of maritime commerce, and consequently this particular aspect of the Hamburg Rules will not be of great concern to the majority of shipowners. However, those shipowners who may be concerned with the carriage of live animals by sea might be forgiven any doubts they may entertain regarding the efficacy of this particular exception in the Hamburg Rules. Such shipowners, pending judicial interpretation of this clause, will find it somewhat difficult to issue instructions to the masters of their ships on the procedure to be followed in the case of loss or damage to live animals. If a number of sheep die in hot weather in the Indian Ocean is this a risk inherent in the carriage of sheep? Should the owner keep the carcasses for postmortem examination? These are the sort of problems which the Hamburg Rules will create for the carriers of live animals who fortunately are relatively few.

(b) Deck Cargo

The Hague Rules definition of goods excludes cargo which, by the contract of carriage is stated as being carried on deck and is so carried. The definition of goods in the Hamburg Rules is wide enough to include deck cargo. Article 9 of the Hamburg Rules deals specifically with deck cargo. The carrier is entitled to carry goods on deck only if such carriage is in accordance with an agreement with the shipper, or with the usage of the particular trade, or is required by statutory rules or regulations.

In the case of an agreement with the shipper for deck carriage, the carrier must insert this in the bill of lading, otherwise he will be estopped from pleading the agreement against a third party who has acquired the bill of lading in good faith (i.e. in ignorance of the fact that the goods have been shipped on deck presumably). Carriers will wish to know how the obligation to insert in the bill of lading the agreement for carriage on deck may be satisfied. Will the obligation be satisfied by a printed clause in the bill of lading which purports to give the carrier a general right to carry on deck? Will a rubber stamp on the face of the bill of lading suffice, or a printed statement on the back to the effect that unless the face of the bill of lading shows agreement for under-deck stowage there is an agreement to on-deck stowage? I am convinced that the carriage of containers on deck on container ships is usage of the trade. If this view is judicially confirmed the problems for shipowners will be much reduced, but if the shipment of containers on deck on a container ship is not regarded as "usage of the particular trade" shipowners will have serious problems because it is not always easy to say which containers will be shipped on deck prior to loading the vessel.

(c) Packaging

The definition of goods in the Hamburg Rules also includes packaging. An attempt to have this restricted to packaging intended for multiple reuse was defeated, and consequently damage to a crate in which machinery is shipped could give rise to a claim even though the machinery itself arrives undamaged. In the circumstances one wonders if a shipowner would be entitled to clause a bill of lading relating to a piece of machinery in a crate "Unprotected – Inadequately packed", because the crate is unprotected even if the machinery is protected.

(d) Non-Commercial and Experimental Cargoes

Many will regret the omission in the Hamburg Rules of a rule on the lines of that contained in Article 6 of the Hague Rules which permitted freedom of contract in relation to the carriage of non-commercial or experimental cargoes. I am not aware that there was any complaint about abuse of that provision in the Hague Rules. It gave a degree of flexibility which was very desirable in relation to these particular types of shipment. Perhaps the provisions of Article 2.3 of the Hamburg Rules may be used to deal with these shipments which would involve matters like the re-supply of Canada's Arctic Settlements. In all cases it will, of course, be necessary to issue a charterparty to avoid the shipment being embraced by the Hamburg Rules.

BURDEN OF PROOF

The general rule relating to the basis of liability under the Hamburg Rules is set out in Article 5.1. To escape liability for loss, damage or delay resulting from an occurrence which takes place while the goods were in his charge as defined in Article 4 the carrier must prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. Whether this will represent a major or a minor change from the position which obtains under the Hague Rules is difficult to say at present. Much will depend on how the courts interpret the phrase "took all measures that could reasonably be required to avoid the occurrence and its consequences". It has been argued that this is the same as absence of fault or neglect, and indeed the Common Understanding which appears in Annex II states that the liability of the carrier under the Hamburg Rules is based upon the principle of presumed fault or neglect. Shipowners are apprehensive because whilst the words "fault or neglect" do not occur in Article 5.1, they do occur many times in the Hamburg Rules elsewhere, e.g. Article 5.4(i), and (ii), Article 5.5, Article 5.7 and Article 12. In view of the omission of the words "fault or neglect" in Article 5.1 and their inclusion elsewhere in the Convention it becomes a matter for speculation as to whether the words "all reasonable measures that could reasonably be required to avoid the occurrence and its consequences" will be interpreted so as to include the defences of perils of the sea, inherent vice, latent defects not discoverable by due diligence, etc., which were set out in Article 4.2 of the Hague Rules 1924. If, as seems likely, different interpretations of Article 5.1 of the Hamburg Rules are given in different jurisdictions, the task of shipowners and their insurers in dealing with cargo claims will be difficult indeed.

I suspect that we shall find some years from now when the Hamburg Rules have been judicially interpreted in various jurisdictions that the burden of proof resting on shipowners will not be very different from the considerable burden of proof which presently rests on shipowners operating under the Hague Rules. However, I also suspect that even if the burden proves to be no heavier than that presently borne by shipowners it will have to be borne more often under the Hamburg Rules because the ambiguities in the text of the Hamburg Rules are likely to lead to an increase in claims and in litigation.

As an example of what I have in mind, may we consider for a moment Article 5.4 which deals with liability for fire. It is interesting to note that the carrier is not liable unless the claimant proves that the fire arose from the fault or neglect on the part of the carrier, his servants or his agents. Independent contractors are not mentioned. Stevedores have frequently been regarded by the courts as independent contractors. Fires on board ship frequently are caused by dockers, employed by stevedores, who carelessly discard cigarettes. I would be pleasantly surprised if in such a case a court decided that the carrier was not liable for the damage caused by the fire because the fire had been caused by the negligence of an independent contractor. I suspect that the court would regard a stevedore in that case as the agent of the vessel because the stevedore is employed to perform what might be regarded as the carrier's duty to load or discharge the goods as the case may be.

On the other hand, although Article 5.4(a)(ii) at first sight seems to relieve the carrier of liability provided he took all measures that could reasonably be required to put out the fire and to avoid or mitigate its consequences, it is possible that this Article might be interpreted so as to enable a claimant to recover if he could establish that the measures taken to extinguish the fire were more than reasonably necessary, and that damage to cargo resulted from those excessive measures. It is often difficult to determine in a crisis what is reasonable, and I earnestly hope that the Convention as interpreted will not create a conflict with the Master's first priority which must always be the safety of his ship and its crew.

I think there can be little doubt that the ambiguities such as those mentioned, and the many others upon which I have not touched, will result in a substantial increase in litigation until the case law built up over the last fifty years on the Hague Rules has been replaced by an equal amount of case law based on the Hamburg Rules.

GENERAL AVERAGE AND SALVAGE

General Average is the oldest form of apportionment of risk in maritime commerce.

The adoption of the Hamburg Rules in my opinion probably will contribute to its early demise. General Average arises so often out of incidents caused by navigational error that the abolition of this defence will probably lead to the abolition of General Average because the basis of liability set out in Article 5 will be the basis for deciding whether or not the consignee may refuse to contribute in General Average. Shipowners will have some difficult practical decisions to take on questions such as whether or not it is worth declaring General Average and collecting General Average deposits, because these decisions will have to be taken in most cases long before the issue of liability is determined.

In regard to salvage, I think shipowners will have great difficulty in deciding whether to put up security for cargo. The shipowner's P & I Club may not be prepared to permit him to do so, in which case the salvor may seek security against the cargo whether it is on board the vessel or ashore with all that this entails. I think that many of the decisions, which presently are taken on the basis that the shipowner will recover from cargo, either directly or through General Average, security put up for cargo in salvage cases, will be made much more difficult under the Hamburg Rules.

In mentioning salvage may I draw attention to the interesting distinction which the Hamburg Rules draws in Article 5.6 between loss, damage or delay resulting from measures to save life on the one hand, and the measures to save property at sea on the other. The carrier is not liable where loss, damage or delay results from any measures to save life, whether those measures are reasonable or unreasonable, but when saving or attempting to save property at sea he is only excused if the loss, damage or delay results from measures which are reasonable. The salvaging vessel could be attempting to save both life and property in the same incident, but the master of the salvaging vessel may not know whether both life and property are at risk until after the event.

CONTENTS OF BILL OF LADING

Most of the items set out in Article 15 would be included in a normal bill of lading, the exception being the requirement contained in Article 15.1(f) that the date on which the goods were taken over by the carrier at the port of loading be stated. It could take many days to load a full cargo of timber, iron ore or grain on a large bulk carrier. If the total cargo is divided into different parcels, covered by different bills of lading at the request of the shipper, it may be very difficult indeed to say just precisely when each particular part of the cargo had been loaded.

A more serious problem arises out of the provisions of Article 16.4 which states that the absence of an endorsement on a bill of lading that freight is payable by the consignee is prima facie evidence that no freight is payable by him. This effectively deprives the carrier of his lien on cargo for unpaid freight. In future it may be necessary for shipowners to withhold bills of lading until the shipper's cheque has been cleared.

Article 16.4 also requires that any demurrage incurred at the loading port which is payable by the consignee must be set forth in the bill of lading. It may be very difficult to do this because it is not always possible to determine the laytime incurred at the loading port before the vessel sails. The statement of facts may not have been agreed by that time. What happens in the case of reversible demurrage? I can see no way in which the shipowner can insert the amount of the demurrage before issuing the bill of lading. Carriers may be obliged to withhold bills of lading with consequent inconvenience to shippers because of Article 16.4.

It has been said that there is no sanction to enforce compliance with Article 15, and indeed Article 15.3 seems to reinforce this view. If this is so I believe commercial men will take a commercial view of Article 15. They will decide for themselves, regardless of the contents of that Article, what information they require in the documents. Because of the speed of modern ships, and because of the risk of postal delays, bills of lading are becoming the exception rather than the rule, particularly in liner trade carried in container ships. To an increasing extent non-negotiable bills of lading or waybills are used, and the information is transmitted electronically from the port of loading to the port of discharge by computer. The problem therefore may not be as great as it appears to be at first sight. However, if a

court applying this Convention was ever to decide that failure to comply with Article 15 deprived the carrier of the defences available to him under the Convention, then Article 15 could create very serious problems indeed for shipowners.

INCREASE IN SHIPOWNER'S COSTS

Whatever else may be said of the Hamburg Rules, one thing at least is clear. The liability of carriers will be substantially increased when the Rules come into operation, and increased liability must lead to increased insurance costs for shipowners. In the budget of most shipowners, insurance is probably the second highest item of cost after wages and salaries. Even a small percentage increase in this major item of cost will therefore be a serious matter for shipowners.

The number of claims which will be submitted to shipowners will increase substantially, and this will involve a further increase in shipowners' costs. Time spent by shore staff in preparing a case for court is a substantial element of cost which is likely to increase because the number of claims is likely to increase. Apart altogether from those claims which proceed to litigation there will be many others which will settle before coming to trial, but which nevertheless will involve shipowners in considerable work and expense. It seems likely that shipowners will have to increase the numbers of their staff to deal with this extra paper work.

I have suggested that litigation is likely to increase as a result of the ambiguities in the text of the Hamburg Rules. The cost of litigation is not to be measured only by the fees paid to lawyers. Frequently members of the ship's crew have to be produced as witnesses. The expense involved includes not only the actual travelling expenses, but also the salary or wages of the seaman involved from the time he leaves the ship upon which he is serving until he rejoins his ship. This expense is frequently doubled because usually it will be necessary to provide a replacement. This type of expense could add up to some thousands of pounds in one claim alone.

It would be naive to expect the world to shed salt tears over the plight of the unhappy shipowner. It is commonly assumed that shipowners can recover in freight any addition to their costs. In the long run, shipowners must either recover their costs, be subsidised, or go bankrupt. I don't think those who are not part of the shipping industry realise just how long that "long run" can be. Perhaps therefore you will bear with me if I try to put in perspective the ability of shipowners to recover increased costs in the freights they earn.

The price which a shipowner gets for the services which he provides is not determined by his costs, but by the ratio between the supply of tonnage available at a particular time and the demand for tonnage at that time. When too much tonnage is chasing too few cargoes the harsh laws of supply and demand provide a potent curb on the power of shipowners to pass on to their customers any increase in their costs. The shipping market is very volatile. It is remarkably subject to booms and depressions. The depressions are more numerous than the booms and are of far longer duration. By kind permission of the General Council of British Shipping I attach a graph of Tramp Time Charter Index Annual Averages 1948–1977 published at page 147 of British Shipping Statistics 1976/77. You will note that average tramp time charter rates in 1977 were less than those in 1957. During the twenty years 1958–1977 rates exceeded the index in only three years, 1970, 1973 and 1974. When one considers that a 26,000 d.w.t. bulk carrier which cost £3.2 million in 1972 costs £10 million today, and that operating costs have increased by at least 120% in the last five years, it is hardly surprising that so many shipping companies are now in serious financial difficulty.

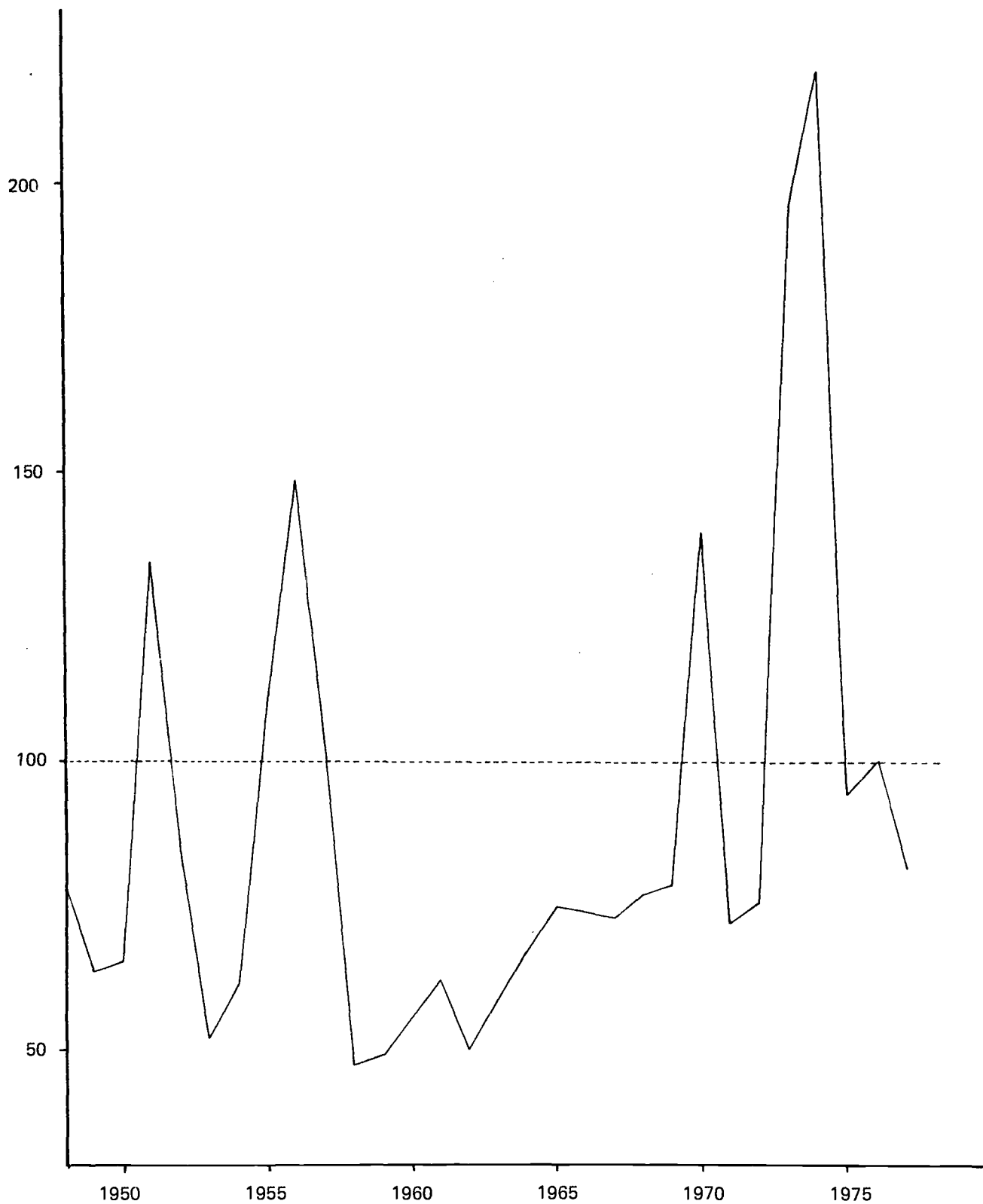
Liner companies which are members of a major Conference have a better chance of increasing their rates to recover increased costs than other shipowners because in fixing tariffs the Conference will examine the operating costs of its members. However, competition from non-Conference Lines curtails the ability of even the most powerful Conferences to increase rates. Non-Conference Lines tend to undercut the rates on the highest rated traffic, and this leaves the less attractive cargo to the Conference Lines.

The liner trade is but a small part of the shipping industry. The merchant fleet of the United Kingdom probably contains a greater proportion of liner shipping than most. Yet, of the total U.K. merchant fleet of 49 million d.w.t. at the 1st of July, 1977, only 11% represented liner tonnage.

Owners engaged in tramp shipping represent the vast bulk of the industry and these owners are at the mercy of the law of supply and demand. Shipowners are concerned about the impact which the Hamburg Rules will have on their costs, because it is difficult to recover increased costs in present market conditions. Shipowners in market economy countries are particularly concerned because they are in business in the hope of making money. As Dr Johnson remarked to William Strahan "There are few ways in which a man can be more innocently employed than in getting money". Shipowners remain the eternal optimists.

Graph H
Tramp time charter index, annual averages 1948–1977.

Index number
(1976 = 100)



Source: table 5.7.

THE EFFECT ON INTERNATIONAL TRADE OF THE IMPLEMENTATION OF THE HAMBURG RULES FROM THE POINT OF VIEW OF THE SHIPPER

Mr Robert Schilling

Consideration of the Hamburg Rules and the contracts of carriage by sea which the Rules will govern leads one automatically to consider the original contract of sale as well as the allied arrangements for insurance and finance.

For the purpose of this study the terms of sale are those defined by the International Chamber of Commerce in its booklet "Incoterms 1953". For the sake of simplicity the words "shipper" and "seller" are used synonymously, as are "buyer" and "consignee". Further, it is assumed that the shipper will not be operating "self insurance" and that the carrier is engaged in regular liner services within Conferences.

The contract of sale is paramount, the contracts of carriage, insurance and finance being ancillary to it. Whilst each of these contracts is quite distinct, they are closely linked and in fact the way in which the contract of sale is formulated will affect quite radically the contents of the other three contracts. Shown as one of the stages in an international sale transaction, the contract of carriage is therefore not an end in itself but a means to achieving an end. Therefore, any international convention which governs contracts of carriage must take fully into account the needs of commerce and the accomplishment, not only of the carriage of the goods, but also of the contract of sale.

The obligations of a shipper under the Incoterms for the three most common cases are the following:—

(1) FOB

- to supply the goods,
- to deliver the goods on board a ship,
- to bear the risks to which the goods are subject up to the time when they are on the ship,
- to provide proof that goods are on the ship.

(2) C + F

as above, plus:

- to contract for carriage of the goods by sea to the named port of destination,
- to supply a clean, negotiable "shipped" bill of lading.

(3) CIF

as above, plus:

- to contract for insurance against risks of carriage up to the named port of destination.

FOB CONTRACT

Under an FOB contract the shipper is not concerned with the contract of carriage unless the buyer specifically requests it. Therefore, the implementation of the Hamburg Rules will not affect present procedures so far as the shipper is concerned.

C + F AND CIF CONTRACTS

In the case of either a CIF or C + F contract the seller is required to procure a contract of carriage and to supply a bill of lading covering the goods. Like the Hague Rules, the Hamburg Rules provide for the issue of a "shipped" bill of lading by the carrier if this is requested by the shipper.

THE BILL OF LADING UNDER CIF OR C + F TERMS

A bill of lading has to be "clean" and "negotiable". These requirements are important since certain remarks inserted in the bill of lading by a carrier may have the effect of rendering the bill of lading unacceptable to third parties and may be in contradiction to the letter of credit stipulations which might result in difficulty in the transfer of funds.

Under the Hague Rules the carrier is not required to sign bills of lading where there is doubt as to the accuracy of the particulars shown on it. The Hamburg Rules, Article 16 paragraph 1, require the carrier to insert a reservation concerning such inaccuracies. It may be argued that dishonesty on the part of some shippers has made these provisions necessary. From a more general standpoint, however, they can only be regarded as a handicap as, in practice, it would be better for the carrier to amend the documents, or issue a new set, according to the circumstances. Article 15 paragraph 2 of the Hamburg Rules introduces the notion of more than one ship being used to carry the goods mentioned on the same bill of lading. This is unfortunate since it is common knowledge that the splitting of cargo is a source of confusion and error and, in addition, may be contrary to letter of credit requirements.

INSURANCE: THE STRICT LIABILITY BILL OF LADING

Under the Hamburg Rules the liability of the carrier will be increased. Article 5 of the Rules subjects the carrier to a general rule of presumed fault whilst at the same time omitting any of the defences which are available to him under the Hague Rules. It is conceivable that this increase in liability may lead to the carrier becoming a common carrier, i.e. accepting absolute liability for the goods entrusted to him when to all intents and purposes he is the insurer of the goods. There would be only three exceptions to this strict liability; Act of God, Queen's Enemies and Inherent Vice of the cargo. In these circumstances, in most cases there would be no separate cargo insurance. It has to be admitted that for many years shippers to a certain extent, and consignees to a considerable extent, have considered carriers as the villains responsible for loss of or damage to cargo. However attractive the idea of the carrier being liable for all loss or damage may be, it can be envisaged that there will be numerous cases where the cargo owner will inevitably fail to recover the full value of his goods. Such is not the case with cargo insurance where, providing there is evidence that the loss is due to a risk covered by the policy, the insurer will automatically pay. Should the Hamburg Rules lead to the introduction of the strict liability bill of lading, the carrier's liability insurance premiums would have to be increased which, in turn, would lead to higher freight rates. This would mean that a shipper, without having any choice in the matter, would have to bear the cost of cover which may not be exactly appropriate. Shippers would regard as most unfortunate the narrowing of the fundamental freedom to choose an insurer which, in their view, would result from the introduction of a strict liability bill of lading. Bearing this in mind, it is most unlikely that shippers will want to alter existing insurance arrangements, especially arrangements such as "through" or "warehouse to warehouse" cover which are currently available through many cargo underwriters. Undoubtedly some overlapping of cover would occur and at the end of the day this would mean that the consumer might have to pay more for his goods.

PERIOD OF RESPONSIBILITY

Under the Hague Rules the carrier's responsibility attaches from the moment he starts to load the goods which can be considered, both in time and space, as being very close to the point at which the marine insurance cover attaches and the obligations of the seller towards the buyer cease.

However, under the Hamburg Rules the carrier's responsibility would attach when he takes the goods into his charge and this may be some considerable time before the loading of the goods on the ship. In this case, the contract of carriage will not yet exist but the shipper will, however, require some undertaking that such a contract will be created. Further, he will require a receipt showing the condition of the goods when he handed them over. To avoid any uncertainty shippers may demand, according to the circumstances, a "received for shipment" bill of lading. Both the Hague Rules and the Hamburg Rules provide for the issue of such documents.

DELAY

The Hamburg Rules introduce provisions which require a carrier to pay penalties in cases where goods are delayed. Whilst the provisions are not yet very clear, and the amounts payable limited to what might be qualified as symbolic amounts, it is to be hoped that trade will be served by these innovations although their effect may be little more than academic.

DECK CARGO

Unlike the Hague Rules, the Hamburg Rules do not preclude carriage on deck but are applicable to cargoes so carried. Further, the Rules establish penalties in cases where the carrier places goods on deck against the wishes of the shipper. This is quite in keeping with modern trade practice, where both letters of credit and cargo insurance policies stipulate carriage under deck.

LIMITS OF LIABILITY

The Hamburg Rules offer increased limits of liability as compared with the Hague Rules. However, the present state of uncertainty in foreign exchange markets diminishes to some extent the effect of these limitation amounts when converted into certain currencies. In practice, the shipper whose cargo is insured against all risks with an underwriter would not be concerned with this. However, shippers generally are agreed that there should be a sanction where the carrier does not perform his task correctly. The amount so fixed should be a deterrent but should certainly not have the effect of impairing performance.

JURISDICTION AND ARBITRATION

Finally, where loss of or damage or delay to the goods occurs, the procedure to be followed under the Hamburg Rules by the consignee in protesting to the carrier, holding joint survey and finally presenting a claim, presents no difficulties or obstacles. The Hamburg Rules define the forum should the consignee or cargo insurer wish to take legal action. There is no equivalent provision in the Hague Rules. The introduction in the Hamburg Rules of provisions for arbitration should also be considered useful although the law applicable will still depend upon the contract of carriage itself.

ARTICLE 4: Period of Responsibility

The Hamburg Rules make the carrier liable during an extended period of responsibility as compared with the Hague Rules.

The effects of the extension of this period should not be overestimated, since the actual points at which responsibility commences and ceases are subject to considerable variations depending on local port customs and practices. It is a well known fact that a considerable portion of particular averages occurs in ports of discharge after carriers have handed goods over to local port authorities or operating companies. Often, local regulations requiring such handing over make it impossible for either carriers or their agents to ensure safe delivery to the consignee.

Where loss or damage occur, the Hamburg Rules do not bring any remedy to the difficult situation in which many consignees find themselves when trying to prove that the loss and/or damage took place whilst the goods were in the custody of the carrier or his agents.

ARTICLE 5: Basis of Liability

The wording of Article 5, para 1, is most unusual, and the meaning seems to be:

- (i) If loss and/or damage occurs, and the merchant can show that it took place whilst the carrier was in charge of the goods, then the carrier is liable, unless,
- (ii) the carrier can identify the cause of the loss/damage and can show that he took all measures that could reasonably be required to avoid the "occurrence" and its consequences.

As far as the cargo-owner is concerned, the practical situation is in many respects the same as under the Hague Rules, since he will still have to establish that the happening occurred whilst the goods were in the care of the carrier. He will then have to lodge a claim in the same way, and await a reply giving the reason(s) why the carrier does (or does not) accept liability.

When we look at the exceptions allowed under the Hague Rules in Article 4(m), (n), (o), (p), the carrier is exonerated if the goods suffered loss/damage by reason of their imperfect state at the time of shipment. These exceptions do not exist in the Hamburg Rules and it is not clear what will happen when carriers wish to invoke pre-existing defects.

The provision concerning delay is an innovation, but the definition is most peculiar. Indeed, in practice, no carrier would ever guarantee anything beyond the date of arrival of his ship in the waters off the port of discharge. So many factors could combine to delay berthing, discharging, customs and quarantine formalities, that it would be utopian to ask for more. Further in Article 5(2) we find "within the time it would be reasonable to require," and then in Article 5(3) we find that it is possible to add 60 very definite days to this somewhat indefinite period. These provisions for liability in cases of delay are unworkable in practice, unless there is a firm written agreement between shipper and carrier at the outset as to the time to be taken to perform the carriage.

No directions are contained in the Rules as to how the indemnity for delay shall be calculated, nor what elements may be included in such calculation. It seems quite likely that unless the procedure is clear and straightforward, many consignees will not ask for redress where goods arrive late. In many cases the small compensation available might not justify the expenses of obtaining written evidence and compiling a claim. The Hamburg Rules do not say which claimant shall have priority, in the case where both seller and buyer present a claim for delay. Shippers see the penalty for delay as an educative element and the redress as something symbolic.

With regard to fire, it seems that there is little to be said, especially in view of the fact that no carrier would deliberately set fire to his own ship, and that in the vast majority of cases the event is an accident. Shippers very seldom possess any evidence which would permit them to take action against the carrier, and in practice it seems as though the status quo is maintained.

ARTICLE 6: Limits of Liability

The Hamburg Rules preserve the two-tier limit of liability system. This is a distinct improvement compared with the Hague Rules, but continues in the line already traced by the 1968 Protocol. However, some interpretation of the text is required because it is not clear.

When loss or damage occurs, the limit of liability is calculated separately for each package affected by the loss or damage. The limit is either 835 SDR's per package or 2.5 SDR's per kilogramme of the gross weight of goods lost or damaged, whichever is the higher.

Further, the limit of the indemnity payable on delayed goods is not clearly explained. If a portion of the total goods shown on a bill of lading is delayed, then the limit of liability is based on the freight paid (or payable) on that part of the goods only, multiplied by a factor of two and half. However, the amount so fixed cannot exceed the total freight paid (or payable) for the entire shipment. This means in practice that, if a carrier knows that part of a shipment is going to be delayed, and that this part represents more than 40% of the total freight for goods mentioned on the bill of lading, he may with impunity delay the whole shipment without incurring any increase in liability.

The provisions, taken over from the 1968 Protocol, concerning pallets and containers are very welcome, and correspond with the needs created by modern transport techniques. However, in practice, it is already a well established fact that carriers insert systematically, on all bills of lading where pallets are involved, the clause "said to

contain" or "contents unknown, carrier has no reasonable means of checking". With containers the standard clause is "shipper's load and count".

It is interesting to note that in the vast majority of cases, goods cannot be weighed in the ports before shipment, and the carrier therefore has to rely on the shipper's declaration in the bill of lading as to the weight of the goods. Such a declaration is not mandatory. Further, in the case of large pieces of cargo (heavy machines and other industrial plant) the weight is estimated from the volume of the material used and its known density. The "per kilogramme" limitation, introduced for the CIM and CMR conventions, is convenient for rail and road traffic, because generally weighbridges are available and suited to the vehicles used. The same may not yet be said of shipping and ports.

ARTICLE 8: Loss of Right to Limit Liability

The carrier (or his servant or agent) loses the right to limit his liability if he has intentionally committed acts or omission, with the intention to cause loss to the merchant, or if he has behaved recklessly with the knowledge that such loss would be caused. It seems that these provisions relate to the actual handling of the cargo, since in the navigation of the ship, the losses which could be incurred, considering both the value of cargo and vessel, would reach colossal proportions.

If one leaves aside the question of intentional degradation of the merchant's property, which is in any case a criminal act, then the idea of recklessness could probably only apply in cases of lateness, for instance to catch the tide, when cargo might be loaded or discharged rapidly and without due care.

Although the intention of the drafters is clear, the practical application of Article 8 is rather obscure.

ARTICLE 15: Contents of the Bill of Lading

The particulars to be shown in the bill of lading are clear enough, but in para 2 the mention of "named ship or ships" is most unfortunate. In practice, cargo should never be split without express permission of the shipper, as this may be in conflict with letter of credit and other stipulations.

Further, when more than one vessel is used to carry the goods, separate documents should normally be issued, each one showing clearly what part of the goods is on the respective ship.

ARTICLE 16: Reservations and Evidentiary Effect

The wording of this Article is most unfortunate because it fails to distinguish clearly between a carrier who establishes a bill of lading in its entirety (including signature) and a carrier who merely signs a bill of lading already completed by the shipper. Obviously para 1 talks of the latter case. The Article will no doubt cause trouble since it does not forbid carriers to sign bills of lading which they know, or have reasonable grounds to suspect, do not accurately represent the goods taken over. In such cases it is far better for the carrier to refuse to sign the document and request a correct version from the shipper, or if the circumstances permit, correct the first document in his possession.

The problem of "without reasonable means of checking" is something quite different, and relates to cargo which by its very nature, or by the way in which it is presented for shipment, precludes easy counting, measuring or weighing. This is notably the problem with palletised and container-packed cargo, as mentioned elsewhere.

Whatever may be the circumstances, it is also most important for carriers to consult shippers before inserting clauses in bills of lading, otherwise considerable difficulties may be encountered subsequently if a third party refuses to recognise the document as valid and negotiable.

ARTICLE 19: Notice of Loss, Damage or Delay

In paragraph 3, the provision concerning joint survey is of no value in practice unless the results of the joint survey have been consigned to paper, signed jointly and a copy retained by each party.

In paragraph 4, the practical circumstances often make it impossible for either of the parties to give reasonable facilities for tallying and checking. This is because the consignee is very often obliged to uplift goods in a port warehouse under the supervision of a party other than the carrier (or his agent) and he has no time or space to inspect or sort the goods, and even less to invite the carrier to attend a joint survey. Further, where carriers would be able to attend such proceedings, the consignee often opts to take immediate delivery without joint survey, simply to preserve the goods from further damage and/or pilferage during the inevitable waiting period preceding such survey.

Paragraph 5 is not clear, since it does not say how the notice shall be formulated.

ARTICLE 20: Limitation of Actions

The Hamburg Rules allow two years for claims, the Hague Rules allowed only half this time. However, the Hamburg Rules refer both to judicial and arbitral proceedings but do not say whether the institution of one of these also suspends the limitation time in respect of the other. It is to be hoped that such is intended, since parties often decide to go to arbitration after judicial proceedings have started.

The limitation period runs from the day when the goods were (or should have been) delivered, as with the Hague Rules. However, the date of delivery is often quite a vague matter, and in practice it has been found that a much more reliable date is that of the arrival of the vessel in the port of discharge. This date is of course slightly in favour of the carrier, but is not a source of hardship for consignees/claimants providing they are well organised in their recourse work.

ARTICLE 21: Jurisdiction

The specification of the forum available to the plaintiff is a useful innovation, and will no doubt do much to clarify the situation for consignees wishing to institute legal proceedings. However, the law applicable depends on the stipulations of the contract of carriage, and will usually be determined by reference to the bill of lading conditions. This is important, since on certain occasions these two notions have been confused by shippers.

ARTICLE 22: Arbitration

The provision for arbitration is also new, but such arbitration probably will be limited to consignees (or possibly shippers) who for certain reasons do not wish to insure their goods with cargo underwriters, but prefer to recover losses directly from carriers.

THE PRACTICAL AND ECONOMIC EFFECTS OF THE HAMBURG RULES FROM THE VIEW OF A CARGO UNDERWRITER

Mr Kurt Schalling

THE ROLE OF SEA TRANSPORT

Sea transport is the dominant mode of transport in the international transit of goods. A change in the liability of the sea carrier will therefore influence the pattern of international trade more than a change in the liability system of other modes of transport.

Sea transport has some special characteristics which result in the allocation of risk being different from other modes of transport. The most important characteristic is the great value of the goods carried on one and the same keel. The exposure in the case of a total loss is a very heavy one. The present system, where the cargo owner bears the risk of a total loss of his goods, generally speaking gives a good spread of the risk and reduces the economic consequences of a total loss. Cargo carried on board a ship in international transit is generally insured with a great number of insurers in various countries.

CONTRACTUAL LIABILITY

We are dealing here with a field where insurance has no social implications. All the parties protected by insurance of the goods or liability for the goods are engaged in international trade and transport. The basis of the transaction is the contract of sale in which it is stipulated at which point in the transit the risk for the loss of or damage to the goods should pass from the seller to the buyer and which party should insure the goods. The insurance contract is closely related to the contract of sale and acts as a form of security for third parties, e.g. banks, who have an interest in the goods in transit. There is less connection between the insurance contract and the contract of carriage.

PROTECTION OF SELLER/BUYER UNDER THE HAGUE RULES

Under the Hague Rules loss of and damage to the goods is generally compensated under the cargo insurance. It is an advantage for the seller or the buyer to have a direct relationship with an insurer of his own choice. By having a direct relationship with an insurer of his choice, the seller or buyer is able to obtain the type of cover he specifically requires and may expect quick settlement of any claim he presents to the insurer. In addition, he will have a direct control over the costs of insurance for he can influence the costs by careful packing of the goods as the premiums payable are generally based upon experience rating. Under cargo insurance if a loss or damage insured against occurs, compensation will be paid and the possible liability of the carrier or any other party concerned is not considered.

RECOURSE ACTIONS

Under the present liability regime recourse actions by the cargo insurer against the carrier are rather limited. A study undertaken by the International Union of Marine Insurance (I.U.M.I.) a year ago showed a European average of between 10–15 per cent of claims paid being recovered from carriers. This figure seemed to be somewhat higher in the U.S.A. It would appear that comparatively few recourse actions are initiated when the goods have suffered a total loss due to error in navigation or nautical fault. This would seem to indicate that the costs of dealing with recoveries are rather limited for the cargo insurer as well as for the carrier and his liability insurer.

SELF-INSURANCE

A few cargo owners prefer to carry the risk of loss of or damage to the goods themselves. Some arrange insurance protection only against total loss or protection in excess of a fixed amount.

THE HAMBURG RULES – A RADICAL CHANGE

The Hamburg Rules may be said to represent a radical shift in the risk allocation between the cargo insurer and the sea carrier. While the UNCTAD Shipping Commission has defined a radical shift as a shift to an absolute strict liability for the sea carrier, the UNCTAD Invisibles Committee (C.I.F.T.) when discussing the study on marine insurance evidently had a wider definition in mind. However, the term is used here to indicate an essential shift in risk allocation. It may be that the Hamburg Rules will turn out to be closer to an absolute strict liability regime than to the present system under the Hague Rules.

THE EFFECTS OF THE HAMBURG RULES

Recoveries will increase

The first thing that will happen if and when the Hamburg Rules have been generally accepted is a heavy increase in recourse actions by cargo insurers against sea carriers. The reason for this, of course, is that the defence of nautical fault will no longer be available to the carrier. Today, a very high percentage of total losses are due to error in navigation, as will be shown later. Recourse actions will be attractive to cargo insurers because they generally involve high values for the cargo lost. In addition, cargo insurers will have an obligation to start recoveries in order to defend the interests of the cargo owner and so as not to be put at a disadvantage in relation to other cargo insurers.

In order to cope with this increase in recourse actions, cargo insurers will have to develop legal departments or use special agencies with legal experience in liability claims. This will no doubt add to the administrative costs of the cargo insurer and also to those of the liability insurer who has to defend the carrier.

Error in navigation

Error in navigation plays an important role as the common cause of total loss to ships and cargo. The British insurance market has made a study of values of cargoes which became a total loss in 1977. According to this study, £399,344,398 was paid in compensation for total losses of non-oil cargoes. Further, it was established that a little more than 40 per cent of this amount represented claims where the loss was due to error in navigation.

The reaction of cargo owners

Under the Hamburg Rules some cargo owners may be tempted to refrain from insuring their goods in transit, relying upon the carrier to bear the liability for a total loss of the cargo. On the other hand, the risk of total loss to the whole consignment may be regarded as a strong argument for the cargo owner to insure his goods. If the cargo owner were to insure his goods, he would not be a self-insurer in the same way as he is under the Hague Rules. His goods would always travel under the new liability regime of the Hamburg Rules and he would have to pay the carrier's liability insurance premium which would be included in the freight. It should be borne in mind, however, that the cargo owner's position in such a case would be an unsafe one as the liability of the carrier is based on a presumption of fault and is limited in a way that could not always be calculated beforehand. In addition, banks financing international trade may be reluctant to accept the liability as security.

The effect of the Hamburg Rules on contractual relationships

The present relationship between the contract of sale, the insurance contract and the contract of carriage will change. This change will be due to the fact that the contract of carriage will impose a greater degree of liability on the carrier which will result in the whole system becoming more rigid.

The Attitude of Carriers

In view of the increase in the number of recourse actions which will be instituted against carriers, some of them may be tempted to take the step and accept full liability for the goods. We will certainly see an increasing number of insured bills of lading or full liability bills of lading for sea transport as far as general cargo is concerned. It should perhaps be mentioned at this point that by insured bill of lading is meant a bill of lading with a cargo

insurance attached while a full liability bill of lading means liability for all loss and damage as if the carrier were a cargo insurer.

Further, it has yet to be established whether the banks would be willing to accept such schemes or if they would still require a cargo insurance certificate. Finding solutions to this type of problem will, of course, increase costs and particularly complicate life for those exporters who generally insure the goods beyond the point of destination of the ship. It will still be necessary for them to maintain a cargo insurance and whilst they have to pay their share of the carrier's liability premium, a high proportion of the claims will be paid by their cargo insurance as it will be difficult at the final point of destination to ascertain how much of the damage really occurred whilst the carrier had the goods in his custody.

Costs

For some years after the ratification of the Hamburg Rules it is to be expected that the two insurance systems which we have now will overlap. The cargo insurer will certainly not be able to reduce his personnel. Instead, as has already been seen he will have to develop his own legal department to deal with the increase in the number of recourse actions. The liability insurer too will need more people to cope with the increasing number of claims.

The total number and the total amount of cargo claims, expressed in percentages of volume and value respectively, may be expected to remain at the same level as today. If one looks at statistics of vessels lost over a given number of years, one will find that an average of between 0.35 and 0.4 per cent of the world tonnage is lost every year. This means the total loss of more than one commercial vessel of more than 500 gross tons every second day in any one year.

Today, the risk premium is carried principally by the cargo insurer. We may presume that in the situation envisaged under the Hamburg Rules the cargo insurer and the liability insurer, when recoveries have been settled, will in the end carry the risk in equal portions. Although there may be reductions in cargo insurance premiums due to recoveries, one should not forget the costs of litigation. Very often these costs fall to some extent upon the cargo insurer even if he has been the successful party in the litigation. Therefore, his costs will remain the same but the risk premium payable will go down. Thus, the percentage of costs in relation to premiums collected will increase considerably.

EFFECT OF THE HAMBURG RULES ON SHIPOWNERS' LIABILITY INSURANCE

Mr Charles Goldie

1. To assess what effect international adoption of the Hamburg Rules would have on shipowners' liability insurance (P & I costs) one should first ask what is the present basis of a shipowner's liabilities in the carriage of goods by sea, for this is the point of departure; the conclusion is soon reached that there is no universally accepted basis, and that standards vary a good deal throughout the world. For example:—
 - (a) When the Hague Rules are applied they are interpreted in different ways in different countries, identical facts will produce wide variations in result depending on the jurisdiction, e.g. differences in the calculation and the application of the package limitation, in the burden of proof and in the type of evidence required to establish the exercise of due diligence to make the ship seaworthy, in the application of "Himalaya" clauses.
 - (b) The application of the Hague Visby Rules to some contracts and in some areas increases the regional variations, as does the existence of a number of jurisdictions where the Hague Rules will not be applied because the state is not a party to the Convention and because the local law on the carriage of goods by sea excludes the operation and overrides the application of the Hague Rules when the Rules should be applied by virtue of the terms of the contract of carriage.
 - (c) There is an "anti-shipowner" trend world wide, a trend towards restricting the defences available to the carrier. In the context of the Hague Rules this means that in many countries it is increasingly difficult for the carrier to prove the exercise of due diligence to make the ship seaworthy, and it is also more difficult for him to rely on some of the exceptions listed in Article 4 Rule 2, in particular (b) Fire, (c) Perils of the sea, (i) Act or omission of the shipper etc., (m) Inherent vice, (p) Latent defects, (q) any other cause arising without the actual fault or privity of the carrier, his servants or agents.

Our point of departure is a jungle; there are now many more regional variations in the basis of liability than there were say ten years ago. It is therefore extremely difficult to assess the effect of the Hamburg Rules. This must always be borne in mind when considering the comments below on categories of claims in which the Hamburg Rules will lead to changes.

2. EFFECT OF ADOPTION OF THE HAMBURG RULES ON CERTAIN CATEGORIES OF CLAIMS

(a) Claims for shortdelivery — break bulk cargoes

These are usually the result of poor tallying or checking, or of theft. The extent to which the shipowner has control over the tallying and checking (including the verifying of the accuracy of bill of lading figures) and the extent of his power to prevent theft vary enormously from one country to another, but in many parts of the world he has no opportunity of control and no means of preventing theft. In such places he is invariably liable now, and the Hamburg Rules will probably make little difference in practice. (Containerised cargo is a different matter; containerisation has dramatically reduced shortdelivery and damage claims particularly in liner trades).

(b) Routine damage claims

The defences available to the carrier in many if not most jurisdictions are already in practice very restricted, whatever the letter of the law may say. It is difficult to see how there could be any considerable increase in the incidence of liability following adoption of the Hamburg Rules. Having said this, however, it must also be remembered that many shipowners and their P & I Clubs negotiate settlement

of claims for less, often much less, than the full amount, even where there would if the claims were litigated be very little possibility of avoiding liability. Often these settlements are on a formula basis, concluded by the application of agreed formulae to calculate the amount payable. The formulae vary from place to place and with different commodities (see e.g. the agreements for settlement of claims for damage to linerboard, paper, motor vehicles) but they all to some extent reflect the existence of legal defences theoretically available to the shipowner as well as the difficulties facing the claimant in proving the quantum of damages. If those defences cease to exist or are reduced, it is to be expected that cargo interests will attempt to replace the existing agreements by others more favourable to them, and this will produce a corresponding increase in the amount payable.

(c) Serious damage claims

It is probable that Article 5 of the Hamburg Rules, imposing liability on the shipowner unless he can prove that he was not at fault, will increase the already considerable difficulties facing a shipowner defending a large claim. Even if, as mentioned earlier, the defences now available are often not of much help in practice, the removal of those defences weakens the shipowner's position; the possibility of successful reliance on Article 4 Rule 2 of the Hague Rules has in the past at least encouraged cargo interests to accept reasonable settlements. In particular it is feared that the elimination of the fire exception in Article 4 Rule 2(b) of the Hague Rules, and its replacement by Article 5 Paragraph 4 of the Hamburg Rules, may well mean that in many cases the shipowner will find it more difficult to repudiate claims for loss or damage caused by fire, though it should be added that some P & I Managers take a different view and feel that to some extent the Hamburg Rules provision on fire are more favourable to the shipowner than the Hague Rules exception, since in the Hamburg Rules it is the claimant who has the burden of proof, the obligation of proving that the fire arose from fault or neglect on the part of the carrier, his servants or agents.

(d) Increase in monetary limits of liability

Under the Hague Rules the limit is £100 Sterling per package or unit, a provision which has produced wide variations in the calculation of the limitation figure. The Hague/Visby amendments (Article IV Rule 5(a) and 5(b) provide for a figure of 10,000 Poincaré francs (approximately £431 at current rates) per package or unit or 30 Poincaré francs (approximately £1.29) per kilo, whichever is the higher. Under the Hamburg Rules the figures are "836 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods whichever is the higher". These amounts currently correspond to £552 and £1.65 respectively. Leaving aside the many problems of interpretation which will bedevil application of the Hague Visby and Hamburg Rules on this point, the increase in the package limitation figure is obvious. Will this have much effect on claims? Probably less than might at first sight be expected. The package limitation is not often an important factor in the negotiated settlement of claims, while in claims adjudicated on by the Courts the tendency is to find reasons for not applying the limitation figure if the latter is very much less than the amount claimed. In this connection it should be remembered that very often even now the package limitation of £100 Sterling is not applied, or is applied on a gold value basis; the increased figure in the Gold Clause agreement is still fairly widely used, and other gold based limitation figures are applied in a number of jurisdictions. Moreover the Hague/Visby limits are already higher than those in the Hague Rules, so that the reform brought about by application of the Hamburg Rules is not so radical as it would be if the present limit were no more than £100 Sterling calculated on a currency basis. Having said this, it must also be pointed out that the effect of these higher limits will be very much greater for some owners than for others. In particular owners operating cargo liner services will be affected, and they tend to estimate that the application of the higher limits will increase claims costs by as much as 25 per cent.

(e) Damage to cargo in collisions

When cargo is damaged in a collision, the carrying ship usually has under the Hague or Hague Visby Rules the defence of error in navigation. This defence has, perhaps surprisingly, remained available over the years, though occasionally when the cargo claim is large the carrying ship ultimately pays a proportion of the damage to the cargo she was carrying when the cargo and the collision claim are litigated in the U.S.A., which has not adopted the 1910 Collision Convention. The Hamburg Rules, permitting direct action by cargo against the carrying ship, will certainly lead to a considerable volume of claims; this is perhaps the most important of all the reforms in the Rules so far as the liability underwriter is concerned. It is however impossible to estimate how large that volume of claims will be.

(f) Unrecoverable General Average contributions

The liability underwriter pays the proportion of General Average, special charges or salvage which the insured shipowner would be entitled to claim from cargo but which is not legally recoverable solely by reason of a breach by the insured shipowner of the contract of carriage or affreightment. In recent years cargo interests have more and more often refused to pay General Average contributions, alleging the ship to be unseaworthy. One has the impression that refusal to pay is almost automatic where there are large sums of money involved, the purpose of refusal sometimes appearing to be the achieving of a negotiated settlement for a reduced amount. The adoption of the Hamburg Rules will add to the already considerable and increasing difficulties faced by shipowners in attempting to recover contributions, but again it is impossible to estimate what increase there will be in claims in this category paid by the shipowner's liability underwriters.

3. COST OF CLAIMS HANDLING

Taking the P & I Club as the traditional and usual form of liability insurance for shipowners, the cost of dealing with claims is made up of costs incurred by the Managers (maintaining offices and experienced staff to deal with claims), and the fees and expenses paid to correspondents, experts, lawyers and others. Experience shows that both items of costs remain remarkably steady, when analysed as percentages of total claims paid in each policy year, and it is unlikely that the advent of the Hamburg Rules will so increase the volume of claims as to affect the figures significantly. The uncertainties and ambiguities in the Hamburg Rules will certainly lead to litigation, though there are differences of opinion among P & I Managers about whether the cost of this litigation will be a relatively small item in the overall total of costs and claims or whether on the other hand it will have a considerable impact on overall costs. Over the years a vast body of case law has developed, particularly in jurisdictions with strong maritime traditions such as the U.K. and the U.S.A. dealing with the interpretation of the Hague Rules. This process will have to be started again and the litigation will certainly continue for many years before we achieve the same degree of certainty and volume of judicial comment in relation to the Hamburg Rules. This will certainly increase the costs of the P & I insurer (and of the cargo owner or cargo underwriter) but it is hard to guess what the amount of the increase will be. Certainly it would be wrong to expect, as some commentators appear to expect, any reduction in costs. Quite apart from litigation having as its object the interpretation of the more obscure sections of the Hamburg Rules, it should be remembered that even a system imposing absolute or strict liability on the shipowner would not produce a dramatic reduction in the cost of claims handling, because there would still remain the important, time consuming and expensive part of the work to be done, namely dealing with quantum and investigating facts for that purpose.

4. VOLUME AND COST OF CLAIMS PAID

In the categories of claims considered above, statistics show that over recent years irrespective of increase or decrease in tonnage a P & I Club can expect to pay the following volume of claims in respect of cargo; the figures are expressed as percentages of the total claims paid in each policy year.

(1) Cargo shortage and damage	30% to 35%
(2) Unrecovered general average contributions	0.25% to 2%
(3) Collision liability to cargo carried in an entered ship	0% to 0.85%

The total in any given policy year is therefore in the range of from around 30% to approximately 38%. Cargo underwriters estimate that at present the rate of recovery from carriers is 10 or 15% of claims paid (a slightly higher rate of recovery being achieved in the USA); at the CMI conference in Aix in 1976 Mr Kihlbom commented in his paper that only a minor proportion of the claims paid by cargo insurers is ultimately transferred to the carrier by way of recourse, the percentage varying from year to year with the trade, commodity and country involved and the range being from below 5% to approximately 20% by value of claims paid. If these figures are applicable for all claims for loss of and damage to cargo (when the cargo owner is self-insured as well as when the claim comes through a cargo underwriter), then using as a basis an assumed present recovery rate of 15% in claims by cargo owners and underwriters against the carrier, and assuming that cargo claims represent 30% of the total claims paid by a P & I Club in a given policy year (the lower end of the range indicated earlier), then for the purposes of illustration one can calculate what in theory would have been the effect if the level of recovery had been higher. A recovery rate of 30%, twice the assumed present level, would increase the total of all claims paid by the P & I insurer by the same amount, 30%, and cargo claims would represent somewhat over 46% of that total. A recovery rate of 60%, four times the present level, would increase the total claims by 90%, and cargo claims would represent over 63% of the total. If, however, the P & I Clubs prove to be correct in their forecasts, predicting smaller increases in the recovery rate, then the increases would not be at all dramatic; a recovery rate of 20% would increase the total claims bill by no more than 10%.

The purpose of these figures is not to estimate accurately what the future cargo claims experience will be, but to illustrate in a very general way the scale of the impact of increased level of recovery on overall P & I costs, using an arbitrarily selected version of present experience for the purposes of the illustration. The figures must be treated with caution when trying to peer into the future because among other things

- (a) the present level of recovery in many areas must be more than 15–20%, at least in the larger claims,
- (b) claims covered by a P & I Club other than those for cargo loss and damage are not static but also increase from year to year,
- (c) any increase in deductibles for cargo cover with a P & I Club will reduce the amount payable by the liability underwriter (though it will also of course correspondingly increase the amount payable by the shipowner),
- (d) it is most unlikely that the recovery rate will rise to as high as 60% or above.

Though it is impossible to do more than guess at what increase in the volume of claims would follow universal or widespread adoption of the Hamburg Rules, the view at present held by many P & I underwriters is that the increase will not be nearly so dramatic as the figures used in the illustration might lead the shipowner and his P & I Club to fear. P & I Managers are not unanimous, their estimates of the impact of the Hamburg Rules on cargo claims paid by the P & I Clubs varying from predictions of as little as 10% increase in cargo claims to forecasts of increases of the order of 25%, but even assuming an increase at the upper end of that scale in cargo claims (and this, notwithstanding the comments from cargo underwriters, would seem to be a pessimistic forecast) this would produce only a relatively small increase in the overall total of cargo claims payable by the liability underwriter. On this basis the effect on the overall costs of liability insurance would probably not be very great. It must be remembered however that quite apart from the Hamburg Rules there is a trend world wide towards imposing on the shipowner greater liabilities for loss of or damage to cargo, and it is likely therefore that over the coming years the volume of claims will increase whether or not the Hamburg Rules are adopted generally as the basis of a carrier's liability. Finally, the P & I Club is not likely to anticipate the probable effect

of adoption of the Hamburg Rules by increasing the contributions required of ship-owner members of the Association to cover the likely increase in liability for cargo claims. The Hamburg Rules will not be universally adopted overnight but will no doubt come into force gradually, and quite apart from that it will be some years before the effect on cargo claims experience of adoption of the Rules becomes clear. The P & I Club underwrites largely on the basis of claims experience and the tendency will therefore be to adjust the rates according to the cargo claims experience of each shipowner over a number of years.

A LEGAL ANALYSIS OF THE HAMBURG RULES

Mr Justice Mustill

As part of the general introduction to the more detailed discussions which are to follow, I have been invited to address the meeting on certain legal problems which arise as a result of the changes introduced by the Hamburg Rules. Since the purpose of my address is to introduce the topic, rather than to discuss it in depth, I propose to offer two groups of observations. First, I shall raise certain general questions in relation to the philosophy and scheme of the Rules, which are material to any attempt at an exposition of the meaning which should be given to those parts of the Rules whose interpretation is capable of dispute. Second, in relation to each of the areas of discussion allocated to the individual Study Groups, I shall draw attention to some of the textual problems raised by the wording of the Rules, with a view to obtaining from the members of the Groups their ideas as to the solution of these problems, which may be reported to the Colloquium in its concluding plenary session.

At first sight it might be thought that an address which concentrates on "philosophy" and "problems" runs counter to the spirit of this Colloquium, already emphasized by Lord Diplock: namely, that our approach to the Convention must be at the same time constructive and practical. This is, in fact, not so at all. If the Colloquium were to spend the next three days in dismembering the Rules, so that nothing emerged at the end of the deliberations except a list of omissions, contradictions and ambiguities, this would indeed be a negative and unfruitful enterprise. It does not, however, follow that it is out of place at the commencement of the discussions to search out the major problems which lawyers, arbitrators and courts will ultimately have to solve when the Rules come into effect. That the Rules give rise to problems of interpretation on a scale quite different from that of the Hague Rules is undeniable. No constructive purpose would be served by pretending that these problems do not exist. On the contrary, the objectives of those who spent so much time and labour in negotiating and drafting the Rules can best be furthered, not by ignoring the difficulties to which the Rules give rise, but by identifying those problems which really matter, and considering how they can best be solved, in accordance with the general intentions which underlie the Rules as a whole.

Equally, there is no departure from the practical theme of this Colloquium involved in giving a little thought to certain general considerations which are relevant when lawyers or courts are faced with specific problems as to the true meaning of the Rules. It is of practical importance to the businessman, as well as to the lawyer, that when the courts are faced with ascertaining the meaning of the Rules, there shall emerge a series of rulings which are consistent with one another and with the true intent of those who prepared and voted upon the text in the Convention. In the past, there has been a tendency for lawyers (or at least those accustomed to the methods of the common law system) to approach questions of interpretation by focussing attention almost exclusively on the words of the text, in the hope of distilling from them, by a process of verbal and grammatical analysis, the definitive view of what the writer must have intended. In the main, this approach has proved sufficient to deal with the comparatively straightforward text of the Hague Rules. It is of practical, and not merely theoretical, importance to know whether it can be adopted with equal success in relation to the Hamburg Rules, or whether some different techniques will have to be developed.

With these observations in mind, I will begin by making certain general observations on the Rules, under three headings: (i) the aims and philosophy of the Rules; (ii) the methods of interpretation which may be appropriate to adopt when considering the wording of the Rules; and, (iii) the juridical status of the Rules.

Aims and Philosophy

The aims and philosophy of the Rules are, in my submission, material to the discussions of this Colloquium for two distinct reasons. First, because the predictions which have been made by businessmen, and which will be further discussed

during this Colloquium, as to the effects of the Rules on international commerce are necessarily founded on the assumption that the declared aims of those who took part in the negotiation of the Convention have been carried into effect in the final version of the text. The lawyers can perform a useful function to businessmen by considering whether this assumption is in fact correct. Second, because I believe that some appreciation of the broad aims of the Convention is an essential pre-requisite to any attempt to construe the individual parts of the text. It may be, of course, that the reader finds himself unable to identify any recognisable themes in the document, or at least any themes which are relevant to the particular words which are being interpreted. Even in such an event, however, the search for the aims of the signatories will not have been wasted effort, since the conclusion that a group of provisions appears to stand on its own (perhaps because it represents a concession to a particular voting bloc in exchange for support on other aspects of the Convention) will justify the reader in paying more attention to the specific wording of the text, and less to considerations of general commercial policy, than would otherwise be appropriate.

Since these remarks are intended to act solely as an introduction to the discussions which will take place in the Study Groups, there would be little purpose in attempting the detailed analysis of the political and commercial logic underlying the words of the text. The various Study Groups will undoubtedly have members who are themselves personally familiar with the negotiations, and will have their own views on the reasons why the Convention takes the shape which it does. Their experience will produce views which are far more accurate and concrete than any which could be formed by an outsider simply on the basis of an attempt to study the voluminous travaux préparatoires. It may, however, be worth drawing attention to the UNCTAD working paper of 1971, which is, at any rate so far as concerns the general uninformed public, the easiest source of reference as to the thoughts of those who concede the Rules. Paragraphs 72 to 176 of this document suggests that the authors had two considerations principally in mind. First, that the incidence of risk is distributed between ship and cargo in a manner which is out of tune with modern economic justice. The second, that the existing regime of the Hague Rules leaves areas of uncertainty as to the delineation between the risks assumed by a ship and those assumed by cargo. This latter feature is said to have two undesirable consequences: (a) the possibility of double insurance, arising because neither ship nor cargo can safely assume that the other party is carrying a particular risk, and (b) an enhanced cost of settling disputes, arising from the uncertainty as to the legal framework of the relationship between the parties to the adventure.

Whether the participants in the Convention were right in the view that the present distribution of risk is unfair, and that the balance should be restored by directing the incidence of risk in the direction of the carrier, is of course a matter for political and economic judgement which is beyond the scope of this introduction. It is, however, legitimate to take into account when construing the Rules the fact that the parties to the Convention believed that there was such an imbalance, and that a re-distribution of risk to the detriment of the carrier is something which the Convention set out to achieve. When attempting to construe the words of the text, the reader should take into account that the Convention was conceived as a positive instrument of radical change, and not simply as a means of making fine adjustments and clarifications of a regime which is assumed to be of a generally satisfactory nature.

The other declared object of the Rules was to reduce the existing areas of uncertainty, and hence to reduce the cost of settling claims. So far as concerns the linguistic problems of understanding the text, it must be at best doubtful whether the improvements hoped for by the authors of the UNCTAD paper have been achieved in practice. One can certainly see that the substitution of a single broad criterion of liability for cargo damage for the list of specific exceptions in Article 4 of the Hague Rules may have simplified the regime: although even that is doubtful, given the serious problems of interpretation raised by Article 5. But apart from this, one is bound to fear that, even in the absence of any hostile or pendantic approach to the Hamburg Rules, the problems of textual analysis seemed to have been multiplied rather than diminished by the formulation of the new text. Perhaps it is simply that we have all grown used to the structure and wording of the

familiar Hague Rules, and feel uncomfortable when faced with something new. I suggest, however, that there may well be numerous areas in which even the most determined attempt to read the Rules in their true sense may leave the reader with a real sense of uncertainty. It will be interesting to see, on the final day of this Colloquium, to what extent the individual Study Groups have found this impression to be justified.

Moreover, there is the point already raised by Mr Goldie in his paper, that by far the greater part of the cost involved in fighting or settling a cargo claim derives from an investigation of the facts, not of the law. The Study Groups may wish to consider, in their own particular areas of study, not only whether the Rules will tend to reduce the number of occasions on which detailed factual investigations are necessary, but also whether in fact the new regime will have precisely the opposite effect. One may take as an example the category of claims for damage to cargo. Claims arise from cargo in two different ways. First, because the ship has suffered a casualty, as a result of which the cargo is damaged. Second, because something has gone wrong (or is said to have gone wrong) with the way in which the cargo was carried during the voyage, without any harm having come to the carrying vessel.

Where the damage stems from a casualty, the cause will usually be either bad luck or bad ship-handling. In either event, the carrier will be exempt from liability under the Hague Rules, by virtue of sub-rules (a), (c), (d) or (q) of Article 4 Rule 2. An investigation into the precise cause of the loss will be unnecessary, because in any view the carrier will be exempt. Under the new regime, the position will be different. Here, in every case there will have to be an exact enquiry into the circumstances of the casualty, in order to discover whether or not the carrier and his servants took all measures that could reasonably be required to avoid the occurrence. The areas of potential dispute would thus seem to be considerably enlarged by the change from the Hague to the Hamburg Rules.

As regards losses which occur otherwise than by reason of a casualty to the ship, a claim under the Hague Rules would require investigation of some or all of the following: the pre-shipment condition of the cargo, inherent vice, unseaworthiness and due diligence, comparisons with other cargoes carried on the same vessel, methods of stowage, and the use of the vessel's cargo carrying equipment. A full investigation of all these matters is notoriously expensive. I suggest, however, that the Hamburg Rules are unlikely to bring about any real improvement. The risks may be distributed in a different manner, but the same investigation will have to be carried out in order to determine on which side of the line the particular incident happened to fall.

Methods of Interpretation

I now turn to offer a few suggestions on the methods by which the Convention may come to be interpreted. It is convenient to begin with Article 3, which stipulates that —

“in the interpretation and application of the provisions of this Convention regard should be had to its international character and to the need to promote uniformity”.

The view has been expressed that this provision, which has a counterpart in several kindred conventions entered into under the auspices of the United Nations, is not intended to form part of the substantive code created by the Convention, but is rather an expression of intent in national governments: the idea being to urge governments to enact domestic legislation giving effect to the Rules. Historically, this may be correct. Nevertheless, an outsider can only remark that the methods and words chosen are singularly ill adapted to their purpose. Those parts of the Convention which are concerned with its coming into force and ratification are found at the end of the document. If the parties really found it necessary to state expressly something which would, in any event, be implied by their becoming signatories to the Convention, there seems no reason why they should have inserted such a provision as a kind of sandwich between clauses which deal with the voyages to which the Rules apply and the period during which the carrier is responsible for the goods: both of them concerned with the substantive rights of the individual parties, rather than the international obligations of the signatory states. Furthermore, Article 3 is concerned with a uniform “interpretation and application” of the Convention. This must surely be designed to regulate the way in which the text is applied as between private parties, rather than to create any obligation between signatory states as to the manner in which the Convention is brought into force.

The uncertainties as to the role which Article 3 is intended to play makes it difficult to predict whether the Article will find its way into the domestic legislation which will ultimately be enacted by signatory states. But whether it does or does not, the Article must plainly be something which any court seized of a dispute under the Rules must take into account. In order to do so, they must first understand what is meant by "the need to promote uniformity", to which they are bound to have regard. These words raise a number of problems.

In the first place, one must ask: "Uniformity of what?". Plainly, the courts are to give a uniform interpretation of the words of the Convention. But this is not the end of the matter. It is true that there are several instances, which will no doubt be the subject of discussion amongst the Study Groups tomorrow, where it is significant to understand, simply as a matter of language, what the words of the Convention are intended to mean. Equally important however are the instances where the meaning of the text is clear enough, but the reader does not know how it is to be applied. The most obvious example is what one may term for short the general liability for fault, created by Article 5 of the Convention when read together with the "Common Understanding" in Annexe II. The carrier has to prove that he, his servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences. Now, subject to certain difficulties, the words themselves are plain enough as a matter of language. The real problems arise in relation to the content which must be given to the words "all" and "reasonably". The courts of each jurisdiction are bound to approach the new problems raised by Article 5 in the light of the decades of experience which they have had in relation to the law of negligence and the concept of reasonable care. Somehow, the courts of the numerous signatories are to strive to submerge their preconceptions in the interest of giving a uniform content to the meaning of Article 5.

The question arises next whether this interpretation of Article 3 should be carried still further. Does the "application" of the Convention include the practical procedural method by which claims under the Convention are dealt with? I suggest that the draughtsmen cannot amend that, for even if it were constitutionally possible for the courts of the member states to change their procedures so as to bring them into harmony with those adopted in the courts of other states, it would scarcely be possible in practice to carry this into effect. It is not only the procedures themselves, but the attitude of mind of practitioners and courts towards those procedures, which are far too deeply engrained for them to be revolutionaries overnight, simply in response to the treaty governing private rights in a particular area of commercial law.

There is, however, an alternative meaning which might be given to the need for "uniformity in application": namely, that there should not only be uniformity as to the rights and liabilities which result when the courts of the various signatory states apply the Rules to a given set of facts, but also that those courts should strive to ensure that kindred factual issues should be decided in the same way whatever court is seized of the dispute. This question is not as academic as it might appear at first sight. Whilst it is true that a dispute on the same set of facts will only really come before courts in more than one different jurisdiction, one does from time to time come across instances of the same type of factual dispute being litigated in more than one place. For example, one has the situation where there are numerous losses of a similar kind to cargoes of the same type, carried on the same or similar voyages. Should courts dealing with disputes of this kind have regard to the decisions of their confreres in other jurisdictions? Again, if one court has found as a fact that a particular usage of a trade exists or does not exist, should the court in another jurisdiction feel itself obliged to come to the same conclusion? I suggest that these questions should be answered in the negative, for a decision on an issue of fact as a stage in resolving a claim under the Rules is not a decision as to the "application" of the Rules. This is, however, a point which the individual Study Groups may care to consider for themselves.

The next question is this: how pressing is the need to promote uniformity to which Article 3 refers? If court "A" decides on the interpretation of a particular part of the text, how far is court "B" obliged to go in deciding upon and enforcing an interpretation with

which the judge of that court may not personally agree? I suggest that the second court is not bound to follow the decision of the first court. Article 3 does not say that uniformity of interpretation and application shall be ensured. The court is merely to have regard to the need to promote uniformity: a much less preventory instruction. In English terminology, it seems that the decisions of court A are to have persuasive but not binding effect. No doubt the discussions in the Study Groups will throw up instances where a particular national court, or a group of courts sharing a common juristic tradition, is likely to interpret the Convention in a different sense from another court or group of courts. It would be interesting to consider, in such a case, how a reconciliation is to be made in the interests of harmonisation, through the medium of the judicial process.

The final question is how the desired uniformity is to be accomplished. There is a real administrative problem here. Court B cannot have regard to a decision of court A, unless it knows that the decision exists, and has some means of satisfying itself that it knows what the decision really means. Any attempt at effective harmonisation through the medium of judicial decision must inevitably fail unless the practitioner can discover those decisions of foreign courts which appear to be relevant to the particular topic; can inspect them to see whether in fact they are useful; and can then bring them before his own court in a comprehensible manner. This is an undertaking which is likely to lie beyond the resources of the average practitioner, and some kind of comprehensive index maintained by an international institution will be essential if the spirit of Article 3 is to be carried into practice. The problem does not end with finding the relevant decision in other jurisdictions. The court must also find a way of understanding their implications. Experience in England has shown that it is simply not enough to read a copy of the judgement delivered by a foreign court if proper understanding of the decision requires at least some comprehension of the general structure of the foreign law, and of the judicial process and legal preconceptions prevailing in a foreign court if the decision is to be properly understood. It is easy for a well-meant judicial exercise in the "harmonisation" of law to lead to an effect very different from what was intended.

These are, of course, matters which cannot be discussed in any detail by the individual Study Groups, within the time available. Nevertheless, I suggest that it would be useful to keep in mind the intent declared by Article 3, and to see to what extent it will be practicable, within the areas of discussion reserved for each individual Study Group, to bring it into practical effect.

Another problem which must be tackled before any attempt is made to construe individual passages in the text of the Rules, is to consider to what extent the traditional methods of interpretation can usefully be applied in the present context. These may be grouped under the headings: (i) textual analysis; (ii) recourse to other statutes or conventions; (iii) the use of travaux préparatoires; and, (iv) the use of alternative translations of the text.

I deal first with textual analysis. Some systems of law have traditionally attached great importance to a close study of the grammar, vocabulary and punctuation of a text when considering problems as to the interpretation of a contract or a statute. This linguistic approach, which is characteristic of the Anglo-Saxons judicial systems, is founded on what one might call the myth of homogeneous drafting. This proceeds from the assumption that the document is prepared by a single individual, known as "the draughtsman". This individual has in his mind a clear and sharp-edged picture of the result which the document is intended to achieve. He then proceeds to transmute this picture into writing, implying his own choice of language, which he perfectly understands and is capable of using with consistency. Sometimes "the draughtsman" may be a small group of persons, rather than a single individual. But even so, they share a common purpose and a common deployment of their linguistic resources. They have no need for compromise, and have sufficiently close working methods to minimise the risk of inconsistencies within the language of the text. If this system works perfectly, the court can legitimately approach the document as if it were a single homogeneous piece of fabric. The draughtsman can be assumed to have said everything that he meant, and to amend everything that he has said in precisely the way that he has said it. It can also safely be assumed that his use of

language is sufficiently consistent for inferences to be drawn down into parallels between different individual parts of the text.

Whatever the general merits of this approach, it plainly must be adopted with great caution, if at all, when construing a document such as the Hamburg Rules. There is no "draughtsman" in the sense to which I referred. Instead, there were numerous individuals and groups, not always working in a language which they were perfectly familiar, contributing over a long period of time their own individual modifications to specific portions of the text. Often, the individual parts of the document are the result of compromise, which is never entirely assimilated into the scheme of the document as a whole. Nor can it safely be assumed that the language of the text precisely reflects the intentions of those who called it into being. This is strikingly demonstrated by the history of Article 5 and the "Common Understanding" in Annexe II.

The problem may be illustrated by reference to Article 8(1) of the Convention, which deals with the loss of the right to limit responsibility. The carrier is precluded from limiting his liability,

"if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier".

A sharp divergence of opinion as to the meaning of this important provision has already developed in maritime circles. Does the carrier lose his right to limit only if he is personally at fault, or does Article 8(1) also cover the acts and omissions of the carrier's servants and agents? An English lawyer would address this question by looking first at the definition of "carrier" in Article 1. This refers to

"any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper".

The reader would not find that this helped towards a solution of the particular problem under consideration, so he would start to cast around, looking for other instances of usage of the word "carrier", in order to see whether it is used in contrast with, or so as to embrace, the carrier's servants and agents. At first sight, he would think that it would be unnecessary to look beyond Article 4(3), where one finds a specific statement that a reference to the "carrier" in that Article means, not only the carrier himself but his servants and agents. The reader could justifiably infer that if it was thought necessary to make that clear in relation to Article 4, a different intention must have been in the minds of those who omitted a similar definition from Article 8. Thus, one might think, the word "carrier" in Article 8 must mean the carrier and no one else. This confidence is, however, dispelled when further perusal of the Convention discloses Article 10, which deals with the liability of the carrier and actual carrier, because he sees that by virtue of Article 10(1) the carrier is responsible for the acts and omissions of the actual carrier and his servants or agents acting within the scope of their employment. The reader might also decide that paragraph (2) of Article 10 gives him yet another different perspective on the use of the word "carrier" in Article 8. Faced with this apparent impasse, the lawyer must return to the text of Article 8 itself. Since he cannot be sure what it means by reading it, either in isolation or in conjunction with other parts of the Convention, he must try to speculate as to what the authors of the Article must have meant, given his knowledge of the declared object of the Convention, together with any reference to outside sources which can legitimately be employed as a guide to interpretation. What sources appear to be available?

First, some writers suggest that guidance may be obtained from a reference to the language of other international conventions relating to the carriage of goods and similar matters. For my part, I doubt this. Reference from one statute to another may sometimes yield useful results where the texts are provided by a central drafting body (such as the English parliamentary draughtsman), where there is some continuity in the use of language, and where it can be assumed that the draughtsman of one document has the language of another specifically in mind. These assumptions are quite inappropriate to international legislation of the present kind. If the circumstances in which the text was drawn up are such as to make it unsafe to assume any homogeneity within the individual text itself, it is to my mind quite unrealistic to look outside the language of the individual convention to that of another, drawn up, on a different occasion by a wholly different group of people.

Another possible source of guidance consists of the travaux préparatoires. English courts have traditionally resisted the use of this type of material. Other systems adopt a different approach. It may well be that some use of travaux préparatoires in relation to the Hamburg Rules will become inevitable in all systems, if only because (if Article 3 means what it appears to mean) once any court has taken such material into consideration, it must inevitably enter the discussions at secondhand in any other court which is subsequently faced with the same problem. Even on this basis, there are obvious difficulties in making use of this material. Most of it is unpublished, and it would be quite beyond the resources of the average practitioner to seek it out. Even when found, it is likely to prove so voluminous as to be almost impossible to handle within the confines of a law suit or arbitration. Finally, even if one were to track down the correct part of the minutes of the appropriate drafting committee meeting, it is far from certain that inspection of the minutes would throw any real light on the problem: for it might well be found that the process which was underway was not really one of drafting to reflect a clearly formulated intent, but rather a system of bargaining whereby the text as a whole was adjusted to a shape which would be tolerably acceptable to all concerned. In passing, it is worth mentioning that perhaps the most accessible source of information as to what happened during the drafting of the Convention consists of the verbal or written recollections of those who took part in the process. One or two Articles on these lines are already in print. They provide some extremely interesting material, but it is far from clear how this material can legitimately be employed, in a court or arbitration, in the resolution of a dispute about the meaning of the text.

Linked with the question of reference to outside sources of interpretation, there is the problem of the force to be given to "vested" meanings of the technical language. The Hamburg Rules contain several terms of phrase which are familiar to students of maritime law — for example "course of employment"; "agent"; "reckless"; "port" and so on. Expressions of this type have often acquired precise and technical legal meanings. These meanings often differ from jurisdiction to jurisdiction; and differ again, on occasion, from the meanings which they have in everyday speech. Given the circumstances in which the Convention was drafted, one must not too readily assume that a word carries the meaning which has been given to it by the courts in the context of a different instrument or field of legal study.

One final problem on interpretation may be mentioned. The Convention exists in six languages, all declared to be equally authoritative. How should a tribunal try to deal with this diversity of tongues? It seems likely that in practice a court or panel of arbitrators will first look at the text in "its own" language, and will have recourse to an alternative version of the text only if the meaning is very doubtful. But how far can this exercise legitimately be carried? No tribunal can attempt to comprehend the linguistic nuances of six different languages. What happens if recourse to more than one alternative language yields different answers? I do not know whether this is largely to prove a serious problem. If a problem exists, it may perhaps be obscured by the fact that the proceedings of this meeting are being conducted in the English language. Nevertheless, since the Rules are plainly going to be the subject of judicial and arbitral decision in many parts of the world, it will be valuable to learn whether there are any provisions in the text which are clearly comprehensible in English, but not in one of the other official languages, and vice versa.

The Juridical Status of the Convention

In my preceding remarks I have drawn attention to some questions which have to be faced before any definitive conclusion can be reached on the interpretation of individual portions of the text. I have done so, not because the time available will permit these various matters to be discussed in any detail during the Study Group meetings, but so that those participating in the meetings who have recourse to the text alone, to the exclusion of other sources, will not necessarily permit an accurate prediction of the conclusions to which a court or arbitration panel is likely to come in the future. It is for the same reason that I will now venture a few observations on the juridical status of the Rules. Perhaps I can best illustrate the problem by contrasting the Hague Rules and the Warsaw Convention on Carriage by Air.

A study of the history and text of the Hague Rules quickly demonstrates that the Rules have a specifically contractual toleration. They operate as a group of statutory implied terms, superimposed on the contract of carriage: see in particular Article 2. That the Hague Rules should have taken this shape is not surprising. They were designed primarily to deal with a situation in which express exempting provisions in the contract of carriage were thought to have been developed to excessive lengths. Moreover, the drafting was heavily influenced by the current Anglo-Saxon notions of commercial law in which the doctrine of the implied terms played a central part. In these circumstances, it was natural for the courts to assume that there was room for the application of ordinary doctrines of contract, such as repudiation, fundamental breach, deviation, and so on, even to a transit to which the Rules applied. It was equally natural for the courts to take it for granted that when deciding how such doctrines should be applied, a search should be made for the "proper law" of the contract of carriage, in just the same way as with any other contract.

The position under the Warsaw Convention was different. This did not set out to operate by way of implied terms, nor indeed was it aimed at the contract of carriage at all. It merely prescribed in mandatory terms the rights and liabilities of the parties in relation to specified transits. It has been held in England that the Warsaw Convention, as enacted in England, creates a self-contained code. It is not necessary or indeed permissible to look at the proper law of the contract of carriage. Presumably there is still a contract of carriage in the background, and if so it must have a proper law. But this is immaterial for the purpose of claims under the Convention. One need look no further than the Convention itself, which constitutes a kind of trans-national statute.

What is the position of the Hamburg Rules? The question is not academic. There is a tendency for any practising lawyer to believe that he will not have to grapple in court with the problems raised by the Rules unless and until there is legislation in his own country which gives effect to the Rules. This will not necessarily be so, if the Hamburg Rules fall into the same general category as the Hague Rules, for a court may well have formal jurisdiction under Article 21 even though it is situated in a country which has not yet enacted the Hamburg Rules. The court may well conclude that the question whether it should pay regard to the Hamburg Rules rather than to the Hague Rules will depend upon whether the Hamburg Rules form part of the proper law of the contract: and in order to deal with that question, the court will first have to decide whether the concept of a proper law has any meaning in relation to a transit governed by the Hamburg Rules.

Furthermore, the status of the Rules is material to the view which the court takes as to the relevance of the ordinary law of contract of tort to disputes arising under the Hamburg Rules. If these are to be regarded as a self-contained code, it may be that the court will try to extract an answer to all relevant questions from the code, rather than by having recourse to doctrines which would otherwise apply.

It is not easy to find an answer to this problem. The Hamburg Rules certainly set out to cover much more ground than was the case with the Hague Rules. Matters such as the rights and liabilities of third parties, liabilities in tort, causation, fraud and the loss of the right to rely on exemptions from liability (which would otherwise be dealt with by doctrines such as "fundamental breach of contract") may all be found within the framework of the Rules. Whether this will be sufficient to persuade national courts to discard the entire existing corpus of shipping law, and start again with a new regime centred on the Hamburg Rules, is questionable. It is impossible to predict with any confidence what will happen, but the existence of the problem cannot safely be ignored by anyone who tries to forecast the practical and legal implications of the new regime.

After these preliminary observations, I now turn to the individual areas of study allocated to the six Study Groups. It is not easy to produce a list of problems, without appearing to adopt a negative stance. This is not at all my intention. If the Rules come into force, everyone must strive to make them work. The task of making them work cannot be accomplished simply by assuming that the meaning of the text is in every respect entirely clear. On the contrary, it is undeniable that the text presents serious difficulties of interpretation. The aims of those who took part in negotiating the Convention can best be

served, not by ignoring the difficulties, but by bringing them to light and giving them careful scrutiny before the time when the Rules begin to come into force. The object of the following remarks is, therefore, simply to suggest where some of the problems may lie; and I will have served a useful purpose if they prompt a certain amount of reflection. even if they do not reach the stages of being discussed in any detail by the Study Groups.

Group One

I suggest the following as being some of the more interesting problems.

- (1) What is the relationship between Article 1, paragraph 6 and Article 4 paragraph 2(a)? The definition of a contract of carriage by sea, in Article 1 paragraph 6 contains a provision that the contract is deemed to be a contract of carriage by sea for the purposes of the Convention only in so far as it relates to the carriage by sea. How does that relate to Article 4, paragraph 2(a) which defines the period of responsibility in terms which might seem to include matters which are not part of the carriage by sea at all?
- (2) How will the courts deal in practice with the sharp break in the legal regime which occurs at the moment when the goods come into the charge of the carrier within the port? Before that period, there is complete freedom of contract under a transportation document which covers land as well as sea transit. Afterwards, the Rules begin to apply. Before the breakpoint it may well be that the burden of proving responsibility for damage rests on the cargo owner and then at the moment that Article 4 bites, the burden of proof is reversed. What practical problems are going to face the cargo-owner and the carrier when they come to prepare their evidence in a cargo action where nobody is sure at what geographical point the damage occurred?
- (3) The identification of the carrier. Under Article 1 the carrier is: "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper."

The definition does not say, "by whom or on whose behalf" the contract has been concluded. What is the position as regards the signatory of the contract of carriage who is disclosed to be an agent but acts for an unnamed principal? What is the position of the groupage forwarding agent? Is he also a carrier? Can the demise clause still be effective under the new regime? Is it any longer legitimate for an apparent carrier to say, "I sign but I do not contract"? If it is legitimate then he is not within Article 1(1) at all, because he is not a person "by whom or in whose name a contract of carriage of goods" is made. Is any light shed on this problem by Article 16(1) which uses the phrase: ". . . the carrier or other person issuing the bill of lading on his behalf. . . ." This seems to suggest that a signatory is not necessarily a carrier for the purposes of the Article.

- (4) Article 11(1) uses the words: ". . . any stipulation limiting or excluding (the liability of the actual carrier) is without effect if no judicial proceedings can be instituted against the actual carrier. . . ."

Do these words refer only to a case where there is no court with jurisdiction to entertain an action against the actual carrier, or do they also cover situations in which a judgment is useless because it cannot be enforced?

- (5) Finally, there is the point raised by Mr McGovern in his paper — namely, the permissibility of clauses shortening the period of responsibility. Those of you familiar with English law will remember the general line of authority of which *Pyrene v. Scindia* is part, in which the Hague Rules were construed as applying only to those duties undertaken by the Hague Rules carrier; so that if the carrier did not undertake to perform the operations of loading and stowing, the Hague Rules did not apply to the loading and stowage. Is the scheme of the present Convention the same? Is it that a sort of contractual animal at all or are you really looking at something nearer the Warsaw Convention which fixes independently of the terms of the contract the duties to be

performed by the carrier so that he cannot attenuate the tasks which he undertakes to perform merely by adjusting the words of his contract? This seems to me an interesting and difficult question.

Group Two

The first, and most obvious group of problems relates to Article 5, and the "Common Understanding" in Annex II. These problems concern both the relationship between the Annex and the Article, and the meaning of each when read in isolation.

Thus, the members of the Group will no doubt wish to ask themselves which of the two predominates. The Annex evidently sets out to explain the Article. But does one look at the Annex only if the meaning of the Article (and other provisions of the Rules) is not clear? Or does one always have primary regard to the Annex, even if the Article is unambiguous. If the latter, why did the draftsmen not use the clear words of the Annex in the Article, instead of choosing words which are, *ex hypothesi*, unclear?

Again, what is the scope of the Annex? The wording suggests that it may be limited to burden of proof, and to emphasising that under the Hamburg Rules the position of the carrier is the same as that of the bailee under many systems of law: viz. that he has the burden of disproving liability for loss whilst the goods are in his care. Yet this is already made perfectly clear by Article 1(1), so why was it thought necessary to add the Annex?

Finally, on this topic, there is the contrast between "presumed fault and neglect" and failure by the carrier to prove that he, his servants or agents took "all measures that could reasonably be required to avoid the occurrence and its consequences? Is there significance in the choice of two quite different expressions? (Incidentally, one presumes that "or agents" means "and agents").

The Article and the Annex lie at the heart of the changes made by the Rules, and it does seem rather unfortunate that in these two provisions, there should be any scope for misunderstanding.

Turning to another topic, what significance should one attach to the difference in language between the general rule of liability in Article 5(1) and the special provision for fire in Article 5(4). One important difference is obviously due to a desire on the part of the legislators to reverse the general burden of proof in case of fire. But there are other differences. Paragraph (4) uses the formula of "fault or neglect" which is also found in Annex II. Is there any significance in the choice of different words in paragraph (1)? Is guidance given by the fact that failure to take all measures that could reasonably be required is referred to in sub-paragraph (ii) of paragraph (4) in conjunction with fault and neglect. Should any inference be drawn from the presence in paragraph (4) of a reference to mitigation of consequences, and none in paragraph (1)?

Before leaving the question of general liability for fault, it is worth raising the question whether Article 5 constitutes a complete code of liability, or whether there is still scope for a potential liability of the carrier in tort. This is perhaps an aspect of the general problem of the juristic status of the Rules. It may prove to be of only academic interest, but the point is worth considering.

The next group of problems relates to delay. These are by no means trivial even where limited by Article 6(1)(b), for example in the case of large bulk cargoes. The sums involved may be substantial, and the topic is a new one, so far as international shipping legislation is concerned.

In the first place, one must consider the extent to which the substantive proper law of the contract (if that expression has meaning in the context of the Rules) continues to govern the liability of the carrier for delay. Article 5(1) simply makes the carrier liable for loss resulting from delay in delivery. The language of paragraph (1) makes it clear that the liability extends to financial loss, as well as to physical damage caused by delay. But it is not clear whether there are any boundaries to the liabilities so created, beyond those

established by Article 6. To take an example from English law, do the existing authorities on remoteness of damage in cases of delay apply to claims under the Rules, or is all damage recoverable, subject to the limit, whether foreseeable or not?

In addition, there are problems on the meaning of Article 5(2). What is meant by a "diligent" carrier? This is not necessarily the same, at least in the English language, as a careful carrier. Take, for example, a ship which has sustained moderate hull damage. A careful carrier might elect to dry-dock. A diligent carrier would perhaps press on with the delivery of the goods. Perhaps in most instances the problem will be solved by applying the words "reasonable" and "having regard to all the circumstances of the case", but I am not sure that this will always be so. Again, there may be problems in deciding what standard is set by the diligent carrier acting reasonably, particularly since the question of liability for delay is overlaid by the requirement for "all measures that could reasonably be required", in paragraph (1). Presumably paragraph (2) sets the standard of performance expected of the carrier, and paragraph (1) prescribes when he is not liable for failure to achieve it. Nevertheless when the two are read together, there appears to be ample scope for dispute.

Moreover, what are "the circumstances of the case" which have to be taken into account, when deciding what is the permitted duration of the transit, under paragraph (2). Carriage from port A to port B may take longer than the strictly necessary, if for example the goods are carried via port C, as part of a liner service. Or they may be over-stowed by goods belonging to others, so that there is delay in discharge. Or the vessel may be elderly and slow, albeit perfectly seaworthy. Again, there is the problem of the agreed time for delivery. The carrier cannot contract out of his liabilities under the Rules. Does this prevent him from achieving the same result, as regards delay, by stipulating a time for delivery so long that the ship is unlikely ever to be late. Is this a solution which is likely to be adopted in practice?

Equally, what are the views of the members of Group 2 on the practical aspects of paragraph (3)? Presumably, the consignee by justifiably treating the goods as lost can entitle himself to recover their full value and this means that he can disclaim them when eventually they arrive. What happens to them at this point? Do they become the property of the carrier? How can either party be sure that the treatment of the goods was justified, in any case where there has been no agreement on a specific time for delivery, for this will depend upon what was reasonable for a diligent carrier in all the circumstances of the case: a topic upon which the consignee may well have little opportunity to inform himself. There seem to be fertile opportunities for dispute, here. There will also be problems if goods are "treated as lost" and therefore retained by the carrier for his own account, and if the carrier ultimately escapes liability by virtue of paragraph (1). Has the consignee any rights in respect of the goods or their proceeds?

Finally, there are problems relating to concurrent causes of loss. The Rules do set out, in Article 5(7) to tackle this topic, but only part of the ground is covered. Paragraph (7) deals with the case where part of the damage is produced by fault or neglect, and another severable part is due to another cause. Here, for the first time (so far as I am aware) in conventions relating to the carriage of goods, there is provision for apportionment of liability. There is, however, no such provision – notwithstanding the opening words of the paragraph, which might lead one to expect otherwise – where two causes combine to produce the same indivisible damage. Does one then fall back on the "all-or-nothing" position which might seem to follow from Article 1, or is there scope to apply such domestic legislation as may exist in the relevant jurisdiction governing for example cases where both the claimant and the defendant are at fault?

Group Three

By far the most important point for this Study Group – and perhaps for any Group – concerns the loss of the right to limit. It may well be that if the limits have been fixed at levels which consignees and their insurers come to regard as excessively low, we shall find the kind of large scale attempts to break the limit which are a commonplace of litigation concerning carriage by air. Under the existing regime for carriage by sea, disputes are

concerned mainly with liability. It is possible that if the Hamburg Rules come into general use, the principal area of dispute will be the loss of the right to limit.

One important aspect of this topic has already been mentioned: namely the question whether the fault of the servants or agents of the carrier, as well as that of the carrier himself, deprives the carrier of the limit. There are, however, other matters which the Study Group may wish to consider –

- (1) The relevant intent to cause loss, damage or delay will probably result, are confined to "such" loss, damage or delay: Article 8(1). This must be a reference back to the actual loss, damage or delay already referred to previously in the paragraph, namely that in respect of which the carrier claims to limit. So far as concerns the English text, this would seem to require the shipper to prove that the actual damage was contemplated by the carrier. This seems unduly narrow, for the precise shape which the damage took will often have been unforeseeable. On the other hand, there seems no warrant for reading the text as requiring only intent or foresight of some loss or damage. Precisely where between those two extremes should the line be drawn.
- (2) The carrier loses the right to limit if he acts "recklessly" and with knowledge that the loss etc. will "probably" result. "Recklessly" is a technical term in English law, denoting one who knowingly runs an unjustified risk. Does the word have the same meaning in this international Convention? If so, how does one accommodate the word "probably". True recklessness involves a recognition of the possibility of damage, and to require the proof of knowledge that damage would probably ensue is going to make the limit considerably more difficult to break.

Also in connection with the limit, Group 2 may care to consider whether Article 8 provides an exclusive definition of the circumstances in which the carrier loses his rights. For example, is there room for the operation of the ordinary contractual doctrine of repudiation? And is there anything left of the concept of deviation?

Two other points may be worth mentioning.

First, what exactly is meant by "used to consolidate." We all have a fairly clear general idea of what is involved in consolidation, but what precisely does the expression mean?

Second, is it possible to reduce the limit by agreement: see Articles 6(4) and 15(1)(o)? The point is not necessarily academic. For a series of cargoes, the shipper might be willing to accept a lower limit in exchange for a reduced freight.

Group Four

Many of the problems which fall within the field of this Study Group have already been raised by Mr McGovern, so I will not discuss them at length.

The first relates to Article 15. The issue of a bill of lading which contains all the prescribed particulars is mandatory, yet no sanction is provided for failure to comply. Plainly, if a carrier can escape without penalty if he omits the required particulars he is likely to do so, since he will then be able to avoid the consequence of Article 16(3). The saving words of Article 15(3) suggest that some penalty is intended to follow upon non-compliance, but the Convention does not tell us what it is. If an incomplete bill of lading is issued, does the carrier lose his right to limit, as under the unamended Warsaw Convention? Surely not. A penalty as severe as that would require to be spelt out explicitly. Presumably the answer is that the carrier is liable in damages; but it is hard to see how, in most cases, the shipper would be able to prove any loss.

Next, what is the "general nature of the goods", which has to be stated in the bill of lading according to Article 15(1)(a)? It is not so easy as it might appear, to decide exactly what this means: yet the carrier must know, if he is not to be in breach of Article 15. The point is also important in relation to Article 16(3)(a).

The next group of problems relates to Article 16(1). In the first place, what (if any) is the penalty for the incorrect insertion of a reservation as to the specified particulars? In view of the "conclusive evidence" provisions of Article 16(3)(b), the carrier will inevitably play safe by including some kind of reservation even in cases where there is no real doubt. This may become a matter of routine unless there is some way of preventing the abuse of Article 16(1) – which, after all, is meant to create a duty, not a right. Can one imply a term, by reading Articles 15(1) and 16(1) together, that the carrier may not include a reservation, unless the circumstances justify it? The point may be important in practice, since reservations may effect the negotiability of the document under a letter of credit.

Again, one must consider what is meant by "reasonable grounds to suspect". The carrier will wish to take the right view on the inclusion or otherwise of a reservation: for if he includes one when he should not, or does not include one when he should, he may incur sanctions. Yet the question what are "reasonable grounds" in any given case is a matter for judgment, not by any means always open to a straightforward answer particularly in the case of an operation such as the issuing of a bill of lading, where there is no time for deliberation. This element of doubt seems to accord ill with the requirements of certainty and speed which are essential to the documentary side of commerce.

The wording of the reservation is also likely to cause problems. It may be that where the carrier only has grounds for suspicion, rather than knowledge of the inaccuracy in the particulars, he is not obliged to specify the inaccuracy, but only his grounds for suspicion. Even so, he may not find it easy to give an accurate summary of his grounds in a formula short enough to be incorporated in a bill of lading.

These are not trivial points, because they affect not only the shipper and carrier, but also the consignee and the negotiating banker.

Article 17 may also be a source of difficulty. The precise effect of an intent to defraud third parties is not easy to ascertain. Perhaps the better reading of the words "in the latter case", in paragraph (3) is that intent to defraud always shuts out the carrier's right of indemnity under paragraph (5) and not merely in those cases where he has taken an express indemnity under Article 2 as well. Even if this is right, the Article gives rise to problems. Did the draughtsman really mean that the indemnity is forfeited only if the carrier **intends** to defraud a third party. A conscious desire to defraud must be very unusual: and if the shipper and the carrier are parties to a conspiracy, the question of one suing the other for an indemnity is hardly likely to arise. Perhaps the draughtsman was thinking of the **reckless** issuance of an inaccurate bill of lading: i.e. where the carrier knows that the document is a potential instrument of fraud, and does not care. Yet the carrier will always be aware of the potential for fraud, whenever he issues a document the contents of which he does not honestly believe to be true. If he cannot be sure whether the particulars are right or not, his correct course is to make a reservation under Article 16(1), not to issue an unreserved bill, and take a letter of indemnity. It will be interesting to know the views of the Study Group on how Article 17 is intended to work.

It is also worth noting that Article 17 deals only with rights of indemnity against the shipper who, if there is a fraud at all, will presumably be party to it. A situation in which the shipper asserts his own fraud as a defence will not frequently arise in practice. Much more important is the question of the carrier's rights under a letter of indemnity issued by a bank or other third party. The Hamburg Rules do not set out to deal with this; nor could they, since the Rules do not bind such third parties.

Group Five

The problems with which this Group will be dealing need not be listed in detail. The nature of the problems is obvious, although the solutions certainly are not.

It seems to me that the most important of all the various questions concerns the collision between the Hamburg Rules and the Hague or Hague/Visby Rules, where the port of destination is in a state which subscribes to the Hamburg Rules, and a port of shipment

which is in a state which does not. It will be very interesting to hear what solutions the Study Group poses to what may prove a very intractable question of conflicts of law.

Next, it may prove interesting to discuss the status of carriage under charterparties, where the only shipping document issued is a simple receipt. These are not within the Rules. Does the Study Group foresee any increase in the use of charterparties, as a means of evading the Rules?

Attention might also be given to the opening words of Article 2, which make the Rules applicable to all contracts of carriage by sea, or the transit therein defined. The scope of the Rules therefore extends beyond contracts covered by a bill of lading, even on the wide meaning which is now given to the latter expression. In certain trades, such as the North Atlantic Liner Trade, the bill of lading is beginning to fall out of use. This does not prevent the transit from being the subject of a "contract of carriage", and hence within the Rules. It follows that by Article 14, the shipper can demand a bill of lading, even if it is not the practice to issue one in the trade in question. Does the Study Group visualize that there will be practical problems in deciding which transits fall within the Rules, and which do not; and also in deciding what is required of the carrier in respect of documentation where the carriage is subject to the Rules? In this respect reference might be made to Article 23(3).

Still in connection with Article 23(3), which is the position as regards the inclusion of a clause paramount where the transit is from a Hague/Visby Rules state to a Hamburg Rules state? At first sight, it would appear that the carrier is required to insert in his bill of lading two inconsistent clauses.

Group Six

Many practical problems arise in relation to the topics covered by this Group. I will mention only a few of these, since the participants in the discussions will no doubt already have their own views on those which are most important.

Article 21(1) begins with the words "In judicial proceedings relating to carriage of goods under this Convention . . .", does this mean that the jurisdiction provisions of the Rules apply to actions brought in respect of claims founded on the Rules, or does it confer jurisdiction in respect of matters about which the Rules have nothing to say: such as claims for freight and demurrage, and for general average?

Article 21(2)(a) permits arrest ". . . in accordance with applicable rules of the law of that State and of international law". What is meant by the reference to international law, in this context? Are the provisions as to jurisdiction in paragraph (1) intended to be separate from those relating to arrest in paragraph (2), apart from the question of "removal"? In other words, are there separate systems of in personam jurisdiction under one paragraph and in rem jurisdiction under the other, or is a Contracting State under an obligation to alter its procedures so as to provide a power of arrest in the four instances listed in paragraph (1)?

It would seem essential that Contracting States should apply the power of removal in a consistent manner. Yet the Rules give little guidance. For example —

- (a) at what stage should the petition for removal be presented?
- (b) What provision is made for costs thrown away in the original proceedings?
- (c) What is the status of the removed action? Is it dismissed or merely staid? Does it revive if the action in the second jurisdiction breaks down for some reason?
- (d) Who decides, and by what standards, the sufficiency of the proffered security?
- (e) What is the status of the new action? Can the claimant add new items of claim, or put his claim on different grounds, or make a larger claim?

Article 21(4)(a) is rather puzzling. Why is it provided that this sub-paragraph applies where an action has been instituted or where judgment has been delivered: for judgment could hardly be delivered if the action had not been instituted? In addition, what exact

amounts to the institution of an action? In particular, is some preliminary procedure such as "saisie preventif" sufficient?

In what circumstances is a judgment of a court to be regarded as "not enforceable" for the purposes of Article 21(4)(a)? Does this mean that there is no procedural mechanism for enforcing it, or does it also embrace the situation in which the judgment is technically enforceable but such enforcement would be fruitless?

Next, one may consider the juristic question of the status of Article 21(1). Does this Article take effect automatically, once the Convention is enacted in a particular state, so that the procedural rules of that state must be amended so as to confer jurisdiction in the four listed cases; or do the provisions of Article 21(1) take effect only subject to the existing law? See in particular the words "according to the law of the State where the court is situated".

Another important point in this connection is whether Article 21(1) creates a jurisdiction which is automatically recognised at the level of enforcement. If state B would not, according to its own procedural rules, recognise a judgment given by state A in one or other of the four cases listed in paragraph (1), does the Convention create a special exception to the rule? In particular, how does this question relate to the existing Conventions on the international recognition of judgments? Are such Conventions "other Conventions" for the purposes of Article 25?

Finally, one may ask whether an arbitration clause in bill of lading is an "agreement evidenced in writing" within Article 22(1)? If the arbitration clause is not even set out in the bill of lading, but is incorporated by reference from some other document e.g. a charter-party is this sufficient for the purposes of Article 22?

REPORT OF GROUP 1

THE PERIOD OF LIABILITY INCLUDING THROUGH CARRIAGE

Articles 4, 10 and 11

Group Chairman – MR R. CLETON

Period of responsibility – Article 4

How should "port of loading" and "port of discharge" be interpreted?

The Group was of the opinion that in principle the concept of "port" should be interpreted according to the law applicable in the country in which the port is situated. In many countries the port area will be determined by the regulations establishing the jurisdiction of the Port Authority. Where the contract of carriage provides for pick-up and delivery services extending outside the port area then in the view of the Group this contract should be regarded as a contract for combined transport.

It was noted that some transport of goods by sea takes place from and/or to locations outside a port area. If these locations are situated in the vicinity of a port area the contract of carriage should in the view of the Group be considered to fall within the scope of application of the Hamburg Rules.

Will the carrier be allowed to reduce the period of responsibility by inserting in the bill of lading or other transport document a special clause with regard to delivery of goods? Will FIO clauses be valid?

The Group was of the opinion that the parties to the contract of carriage are free to agree which obligations each party has to fulfil and consequently they may fix by contract both the time at which the carrier will take charge of the goods and the time when he will deliver the goods. In the light of this opinion the Group considered that such clauses as FIO clauses would not derogate from Article 4.

What are the possible economic effects of the extension of the period of responsibility of the carrier under the Hamburg Rules as compared with the Hague, Hague Visby Rules?

Since the Hague, Hague Visby Rules apply only to the period of time from the moment when the goods are loaded on to the moment when they are discharged from the ship national law determines the liability of the carrier during the period before loading and after discharge. Therefore, the effect of the extension of the period of responsibility of the carrier under the Hamburg Rules will vary from country to country. In general the Group did not expect the Hamburg Rules to have a serious financial effect in this respect.

Liability of the carrier and actual carrier – Article 10

Would the Hamburg Rules permit demise clauses or other similar clauses enabling the party with whom the shipper has apparently entered into a contract of escape liability?

The Group considered that one of the purposes of the Hamburg Rules was to avoid any uncertainty as to the identity of the contracting carrier. However, according to Article 1 paragraph 1 a person acting on behalf of the contracting carrier may conclude a

contract of carriage with the shipper. Therefore, a demise clause would be valid provided that the document discloses beyond any doubt the identity of the contracting carrier. In this respect the Group considered that according to Article 15 the bill of lading must include the name and principal place of business of the carrier.

How will the Courts apply Article 10 paragraph 5, (aggregation of limits) where a claimant has instituted judicial proceedings against both the carrier and the actual carrier in different jurisdictions?

The Group felt that in view of the range of possible jurisdictions provided for under Articles 21 and 22 concurring actions against the carrier and the actual carrier in different countries may take place and that the Convention did not deal with this problem. The Group was of the opinion that national procedural rules would have to be passed in order to guarantee the application of the provision contained in Article 10 paragraph 5.

Is the contracting carrier entitled to limit his liability under the Convention if it is proved that the actual carrier cannot limit his liability under Article 8?

The two following conflicting views emerged during the Group discussions:

- (a) The contracting carrier is not entitled to limitation because according to the second sentence of paragraph 1 of Article 10 he is responsible in relation to the carriage performed by the actual carrier for the acts and omissions of the actual carrier.
- (b) The contracting carrier is entitled to limitation because by virtue of Article 8 paragraph 1 only his own act or omission would deprive him of his right to limitation; this provision can only refer to one and the same carrier, i.e. the carrier whose personal act or omission has caused the loss, damage or delay.

Through Carriage – Article 11

Will Article 11 affect present practices with regard to arrangements by carriers for through carriage of goods?

It was felt by the Group that Article 11 would affect present practices because it will not always be possible to guarantee connecting on carriage without delay with the carrier named in the contract unless the contracting carrier would be prepared to accept responsibility for the entire voyage.

How may the second sentence of paragraph 1 Article 11 be interpreted?

The Group felt that this provision could give rise to several questions. In the first place it is not clear what is meant by the words “. . . . if no judicial proceedings can be instituted”. Moreover, the question arises of whether a Court referred to in this provision could be a Court of a non-contracting state which would be bound to apply the Hamburg Rules. If such a Court were to apply a legal regime other than the Hamburg Rules paragraph 2 of Article 11 could not operate.

REPORT OF GROUP 2

BASIS OF LIABILITY, INCLUDING PROBLEMS RELATING TO SALVAGE AND GENERAL AVERAGE

Articles 5 and 24

Group Chairman – PROFESSOR E. SELVIG

The General Rule of Liability – Article 5

In the opinion of the Group Article 5 paragraph 1 should be read as reflecting liability based on presumed fault and neglect. Proof that "all measures that could reasonably be required to avoid the occurrence and its consequences" had been taken, was regarded as the essential element of proof that no fault or neglect had been committed. Although the "Common Understanding" in Annexe II to the Convention is not a formal part of it, it was felt by the Group that it would provide guidance for the interpretation of the main liability rule in accordance with the above view.

The Group considered that the standard of care required of the carrier under Article 5 paragraph 1 would be similar to that required under the "due diligence" and other fault or neglect concepts in the Hague, Hague Visby Rules. Consequently it was considered that existing case law would provide valuable guidance. However, it was recognised that some variations in national law might continue to exist in the fields of negligence and burden of proof. Thus, it was noted that courts of different countries might not look upon cases of unknown cause of damage in exactly the same way since in some countries affirmative proof of reasonable care would not necessarily be held to be sufficient to avoid liability.

Deviation.

It was considered by the Group that Article 5 paragraph 1 determines the liability of the carrier for cargo damage and delay resulting from or occurring after a deviation. Whether the carrier will be entitled to invoke limitation of liability depends upon Article 8 which will exclude the application of national doctrines based on "breach by deviation", "fundamental breach" or other like concepts. However, it was recognised that there may be arguments in support of continued application of such doctrines in some countries.

Agents and Independent Contractors.

It was considered that "servants and agents" in Article 5 paragraph 1 should be read so as to include any person employed by the carrier in the performance of the contract of carriage whether or not according to national law he was strictly speaking an agent or an independent contractor employed on an "ad hoc" basis by the carrier. However, it was recognised that national law might affect the decision of courts in particular cases.

Concurrent causes.

Article 5 paragraph 7 was discussed in the context of the carrier's liability towards his cargo in the situation of a both-to-blame collision. It was the prevailing view that under Article 5 paragraphs 1 and 7 the carrier would be fully liable towards the cargo owner. However, the carrier would have recourse against the other ship by virtue of the Collision Convention.

Fire.

Liability in cases where damage is caused by fire is determined by Article 5 paragraph 4. In the opinion of the Group this provision would place the carrier in a somewhat better position than under the Hague, Hague Visby Rules, since in cases where the fire has resulted from unseaworthiness Article 4 paragraph 1 of the Hague Visby Rules places the burden of proof as regards due diligence on the carrier. Further, in cases where a carrier is not liable for the cause of the fire but is liable for failure to mitigate its consequences, Article 5 paragraph 7 of the Hamburg Rules will apply.

General Average – Article 24.

Article 24 indicates clearly that the Hamburg Rules do not abolish General Average. It was recognised that notwithstanding the extension of liability of the carrier by the Hamburg Rules there will remain many cases in which either the carrier or the cargo owner will wish to declare General Average in order to recover in respect of sacrifices made or expenses incurred for the common safety. However, it was envisaged that P & I Insurers will play a greater role in the covering of General Average contributions and that in the long run this would result in changes in present practices.

In cases where the carrier is liable for the event giving rise to the General Average situation a cargo owner will not have a duty to pay contributions to the shipowner but he will have a duty to pay contributions to another cargo owner. He will also have a right to demand contribution from the shipowner. Article 24 paragraph 2 which gives the cargo owner a right to refuse contributions to the shipowner is in line with Rule D of the York-Antwerp Rules 1974.

The liability of the carrier for damages imposed by Article 24 paragraph 2 deals with the right of the cargo owner to recover compensation for his own contribution as well as the contribution he has paid to another cargo owner or to the shipowner. Such a claim would be subject to limitation. The provision of Article 24 paragraph 2 also gives the cargo owner the right to recover damages for salvage remuneration paid by him to the salvors for the salvage of his cargo. However, in such a case, according to Rule VI of the York-Antwerp Rules the cargo owner is entitled in the first instance to recover the shipowner's contribution and subsequently to recover damages under Article 24 paragraph 2 for his own contribution. The liability of the shipowner for such damages is subject to limitation.

REPORT OF GROUP 3

THE LIMITS OF LIABILITY AND THE LOSS OF THE RIGHT TO LIMIT

Articles 6, 8, 9(4) and 26(4)

Group Chairman – PROFESSOR F. BERLINGIERI

Limits of liability – Article 6

Whether the benefit of limitation is available only if the carrier invokes the limit.

In the opinion of the Group the wording of Article 6(1)(a) seems to indicate that the limit applies automatically without the need of an express application for limitation by the carrier. It would follow that limitation can be sought also in appeal proceedings. The position in England and in some other countries appears to be that the initiative of the defendant in pleading limitation is necessary. However, it was felt that the problem was possibly not of great practical significance.

The concepts of package and shipping unit.

Whilst as under the Hague, Hague Visby Rules the same problem continues to exist with regard to the concept of package, in the opinion of the Group the notion of shipping unit in Article 6(1)(a) of the Hamburg Rules seems to apply only to physical units and thus would appear to have no application to bulk cargo.

The limit in cases of delay.

In the opinion of the Group the calculation of the limit according to the provision in Article 6(1)(b) may be difficult in cases where (a) a lump sum freight has been paid in respect of different types of cargo of which only some have been delayed and (b) in cases of combined transport. However, it was generally agreed that the problem could be overcome by using expert evidence.

The total loss limit.

Although Article 6 paragraph 1(c) seems to contemplate only cases where both loss or damage and delay have occurred together the consensus of opinion was that the total loss limit applied in all cases and therefore the liability for delay in sub-paragraph (b) can never exceed the limit in sub-paragraph (a).

Consolidated cargo.

The question was raised as to whether an "actual carrier" could rely on a limit based on his own bill of lading which enumerated only the number of containers or pallets or whether he would be found liable under another document issued by the "carrier" which enumerated each package of the consignment. The Group felt that the actual carrier could rely on his own bill of lading since by virtue of Article 6(2)(a) other documents are relevant only if a bill of lading is not issued.

Increase of the limits by agreement.

The Group discussed the situation where in accordance with the provision in Article 6(4) the shipper and carrier agree to a limit which is higher than the Convention limit but subsequently becomes lower on account of inflation. Some members of the Group expressed the view that this would be contrary to Article 23(1) whilst others felt that since the limit was higher when agreed this would not contravene Article 23(1). An analogy was drawn between Article 23(1) and the provision in Article 26(1) which enables the parties to fix the date of conversion of SDRs into local currency by agreement.

The unit of account – Article 26

Article 26(4) provides that the result of the conversion of the limit expressed in Poincaré Francs into national currency must be communicated to the depositary when ratifying or acceding to the Convention, at the latest. The Group discussed the question of whether Article 26(4) imposed a duty on Contracting States to provide a mechanism whereby the real value of the limits in the national currency could be maintained. It was felt that such a mechanism would appear to be contemplated by the last sentence of Article 26(4).

Loss of right to limit – Articles 8 and 9(4)

The General Rules.

The Group agreed that the reference to the carrier in Article 8 paragraph 1 should be construed to mean the carrier himself and not his servants or agents. It was felt that to hold otherwise would make paragraph 2 superfluous. The Group's conclusion was further reinforced by the fact that an alternative text providing for the breakability of the carrier's limit in cases of recklessness etc., by his servants or agents had been rejected by the Diplomatic Conference.

Where the carrier is a company the problem arises as to whose acts or omissions are relevant for the purposes of paragraph 1. It was established that the position varied considerably in different jurisdictions.

The phrase "recklessly and with knowledge that such loss, damage or delay would probably result" was then discussed and the Group expressed the view that:—

- (i) The word "recklessly" (*témérement*) implied some wanton action or action taken without regard to the consequences.
- (ii) The word "probably" implied an objective test.

Further, the Group discussed the words "such loss, damage or delay" in paragraphs 1 and 2 and concluded that the loss or damage referred to should be of the same kind as the actual loss or damage.

Special Rules.

The Group felt that the loss of the right to limit in Article 9(4) only applied where there is an express agreement providing for carriage underdeck and not where carriage on deck is only in violation of Article 9(1).

REPORT OF GROUP 4
THE CONTENTS OF THE BILL OF LADING RESERVATIONS AND
EVIDENTIARY EFFECT

Articles 14, 15 and 17

Group Chairman – PROFESSOR F.J. CADWALLADER

Issue of Bill of Lading – Article 14.

Signature by a Person.

Insofar as "a person" is appointed to act for a carrier in the signing of a bill of lading it would be within his usual authority to note the condition of the goods and to enter "reservations" or take indemnities in lieu thereof. Any personal restrictions on the latter rights by the carrier would have no effect in relation to a third party relying on such authority. In the opinion of the Group this was particularly important in relation to the effects of Article 17 paragraphs 3 and 4.

Signature by Master deemed on behalf of carrier.

Where the bill of lading is signed by the master then in the opinion of the Group the effect of Article 14 paragraph 2 is apparently to render the Demise Clause, in its present form, ineffective. The attempt to substitute another person as "the carrier" would be contrary to the wording of Article 14 paragraph 2 and thus null and void under Article 23 paragraph 1. It was felt that a more limited form of the Demise Clause may be possible under the provisions of Article 11 paragraph 1. This would arise in the case of "through carriage", where the carrier may disclaim liability as set out in Article 11 if the contract of carriage provides for a specified part of the carriage to be performed by a named person other than the carrier.

Details in the Bill of Lading furnished by the shipper – Article 15.

General nature of the goods – Article 15 paragraph 1(a).

It was felt by the Group that from the point of view of the carrier this meant the "general commercial nature of the goods". By reason of Article 15 paragraph 1(a), however, this must be subject to the addition of such other particulars as the shipper may furnish. This would include details necessary to conform with letter of credit stipulations. Whilst the carrier might refuse to accept other particulars as not being within the "general nature" of the goods it was felt that such doubts as the carrier might have as to the correctness of the additional particulars would be best dealt with by entry of a "reservation" under Article 16 paragraph 1. In the relevant circumstances, however, the provisions of Article 17 paragraph 1 would be available to the carrier.

Dangerous Character – Articles 15 paragraph 1(a) and 13 paragraph 2.

This was considered by the Group to have a broader meaning than goods already deemed dangerous by virtue of convention or local law. The requirement as to "precaution" to be notified to the carrier was not felt to be part of the "general character" of the goods.

“And Weight” – Article 15 paragraph 1(a).

Although the omission of the weight of goods by the shipper would not affect the validity of the bill of lading, Article 15 paragraph 3, in the view of the Group its absence would appear to present difficulties in the light of the provisions of Article 6 paragraph 1(a) concerning limitation of liability.

Details in the Bill of Lading not furnished by shipper.

Freight “or other indication” – Article 15 paragraph 1(k).

Insofar as “other indication” does not mean an indication of the exact amount outstanding, it was felt by the Group that various expressions such as “freight payable at destination” or “freight as per charterparty” would be valid. However, this did not mean that bankers would necessarily find such terms acceptable.

Deck cargo – Article 15 paragraph 1(m) – Article 9 paragraph 2.

It was felt by the Group that in the relevant circumstances a printed clause in a bill of lading ought to be accepted as “inserted” as long as there is a prior agreement to the effect that cargo shall or may be carried on deck. It was accepted that this interpretation might infringe certain national laws.

Sanctions against a Carrier for omission of details required in a Bill of Lading.

Unless the provisions of Article 5 paragraph 1, in particular in relation to delay, are available there is no overall form of sanction for omission of general details required to be inserted in the bill of lading. If the provisions of Article 5 paragraph 1 are available then Article 6 and Article 8 will apply. It was the opinion of the Group that the omission of such details would not render the carrier defenceless but that the matter was best left for national legislation.

Reservations – Article 16.

In the view of the Group the forms used by carriers at present would appear to be unsuitable for the purpose of Article 16 paragraph 1. It was not felt possible to determine the extent to which a carrier may have to “specify” these “reservations”, particularly in relation to “suspicion” or “no reasonable means” of checking. In the view of the group it was clear that the practice would be largely governed by what “reservations” would be accepted by commercial banks without their regarding the bill of lading as claused.

Indemnities – Article 17.

Whilst Article 17 paragraph 1 permits an indemnity to the carrier it is clear that this does not relieve the carrier of the duty to check the details furnished by the shipper so far as is commercially possible for the purposes of a “reservation” or otherwise under Article 16 paragraph 1.

Intent to defraud – Article 17 paragraph 3.

In the view of the Group the mere taking of a guarantee or indemnity by the carrier should not be accepted as prima facie evidence of an “intent to defraud”.

REPORT OF GROUP 5

SCOPE OF APPLICATION AND CO-EXISTENCE WITH THE HAGUE AND HAGUE VISBY RULES

Articles 2, 23(iii), 25 and 31

Group Chairman — MR M. J. SHAH

SCOPE OF APPLICATION — Article 2; contractual stipulations — Article 23 (iii)

The Inclusion of "Inbound" Shipments.

It was suggested that this particular provision was introduced so as to prevent the application of restrictive jurisdiction clauses in bills of lading which had caused problems for cargo claimants in many countries. It was felt by the Group, however, that the provision might cause problems of private international law in jurisdictions where the Hamburg and Hague, Hague Visby systems were in conflict. In States where the Hamburg Rules applied there would be no conflict as those Rules would be enforced in respect of both outward and inward shipments. However, in States where the Hague, Hague Visby Rules were in operation solutions to the problem would depend upon the approach adopted by the Courts in those States with regard to questions of conflict.

Contractual Stipulations.

In the opinion of the Group shipowners might find difficulty in complying with the provisions of Article 23(iii) during the period when the Hague or Hague Visby Rules might co-exist internationally with the Hamburg Rules. This difficulty would be highlighted particularly in cases where Contracting States to the Hague or Hague Visby Rules require a reference to those Rules in bills of lading by virtue of a provision in their national law. A possible solution to this problem indicated by the Group was for shipowners to refer to the Hamburg Rules in bills of lading "only insofar as they are compulsorily applicable". However, some members of the Group doubted whether the suggested solution was sufficient to comply with Article 23(iii).

The Application of the Hamburg Rules to "contracts of carriage" and not merely to Bills of Lading.

Views were expressed regarding the uncertainties which might arise as to which types of documents were or were not contracts of carriage. Opinion varied as to the seriousness of any practical problems which might arise. In this regard it was pointed out that the use of bills of lading was decreasing in many trades. In the opinion of the Group the crucial problem would lie in trying to prevent spurious charterparties being introduced to circumvent the Rules. The Group believed, however, that in practice Courts would prevent abuse of the provisions and any uncertainties would be limited to borderline cases.

Other Conventions — Article 25.

In the view of the Group the intention of paragraph 1, 3, 4 and 5 was the wish to preserve the integrity of existing transport conventions which might otherwise overlap with the Hamburg Rules. However, some members of the Group felt that the language of paragraph 5 might not achieve such a result and that the problems of conflict would arise in certain jurisdictions. It was agreed by the members of the Group that the purpose of

paragraph 5 was merely to identify those other conventions and not to provide a solution for Courts when dealing with a problem of conflict.

Further, it was agreed that paragraph 2 was intended to protect choice of forum provisions contained in certain multi-lateral and regional agreements. The majority of the members of the Group felt that the EEC Convention on Jurisdiction and the New York Convention on Enforcement of Arbitral Awards were preserved by paragraph 2 and that rejection of valid Arbitration Clauses would possibly be rendered more difficult in States which have not ratified those Conventions.

Denunciation of other Conventions – Article 31.

It was recognised that there was a need for an orderly phasing out of the Hague and Hague Visby regimes on the part of those States which wished to adhere to the Hamburg Rules. However, several members of the Group expressed the view that the provisions of paragraph 4 would be legally impossible to carry out under public international law.

REPORT OF GROUP 6
JURISDICTION AND ARBITRATION
Articles 21, 22 and 25(ii)
Group Chairman – DR W. MULLER

Jurisdiction – Article 21

It was considered that in the light of the wording of Article 21(i) and the definition of a "contract of carriage by sea" contained in Article 1(vi) the jurisdiction rules apply not only in respect of cargo owners' claims against the carrier for loss of or damage to cargo or delay in delivery but also in respect of claims by the carrier for freight and demurrage. It was pointed out, however, that Article 21(i) does not include claims by the carrier for contribution in General Average.

Article 21(i) was considered by the Group to be a rule of international law creating jurisdiction "ratione loci" in Contracting States even if the national law of those States does not provide the same fora. However, certain reservation was expressed with regard to this view due to the words ". . . . according to the law of the State where the court is situated".

It was the view of the Group that in cases where a contract was entered into by parties resident in different places that the provision in Article 21(i)(b) "the place where the contract was made" should be determined by the applicable national law or rules of private international law, as the case may be.

With regard to Article 21(ii), if according to national or international law, particularly the 1952 Arrest Convention, the arrest of a ship is ordered and executed it was the Group's view that Article 21(ii)(a) of the Rules also creates a "forum arresti" for a claim on the merits subject to a valid petition for removal of the action. It was the view of the Group that when considering the procedural effects of removal of action in accordance with Article 21(ii)(a), the provision in Article 21(iv)(c) should be borne in mind. This provides that the removal of an action to a different court within the same country or to a court in another country is not to be considered as the starting of a new action. It follows from this that the first action even if later removed has the effect of interrupting the time limit. Further, the Group considered that because a petition of removal may be regarded as being in the nature of a rejection of jurisdiction it should be a condition for a petition of removal that the defendant introduces his petition in limine litis. The costs of the procedure in the first court should be provisionally assessed by that court leaving the second court to make the final assessment in its judgment. However, even if national courts apply these provisions of the Convention in this spirit many procedural questions will remain open.

The word "enforceability" in Article 21(iv)(a) was considered by the Group in a formal and legal sense to mean that the judgment tendered or to be tendered in a court must be recognised and executed by a competent court (by exequatur) in another country before the defendant may invoke the principle of "non bis in idem" or "litispendentia". Whilst the Convention contains provisions regarding competent jurisdiction it is unbalanced in the sense that it lacks provision concerning the recognition and enforcement of judgments given in such jurisdictions. Thus, existing national or international law would remain applicable and this might lead to the refusal to recognise and enforce a judgment given by a court of competent jurisdiction within Article 21. It was therefore the view of the Group that it would be advisable for any plaintiff to have regard to the maxim "caveat actor".

Arbitration – Article 22

Some members of the Group were uncertain as to whether the provision in Article 22(i), which permits the parties to provide by agreement “evidenced in writing” that any dispute be referred to arbitration, would allow unilateral insertion of an arbitration clause in a bill of lading signed only by the carrier. The same point applied to the “special annotation” provision in Article 22(ii).

It was felt by the Group that the question of the meaning of “writing” in Article 1(viii) and of the actual method of signature in Article 14(iii) was tied up with the subject of co-existence with other Conventions preserved in Article 25(ii); e.g. New York Convention 1958, Geneva Convention 1961; for Latin American countries the Montevideo Convention and the Codigo Bustamante. It was felt that the validity of writing and signature would be tested when recognition and execution of an arbitration award is attempted.

Other Conventions – Article 25(ii)

As Article 57 of the 1968 EEC Convention contains a reservation in favour of particular Conventions there would appear to be no problem of incompatibility. However, with regard to existing multi-lateral Conventions on jurisdiction and in particular on recognition and enforcement of foreign judgments and arbitration awards these, as has already been pointed out, may be in conflict with the Hamburg Rules. It cannot be predicted whether as between different countries the courts will give preference to the provisions in existing Conventions and if such provisions will be considered as mandatory within the meaning of Article 25(ii).

SUMMING UP

THE LORD DIPLOCK

The time has now arrived for me to give what is called a "summing up". It will necessarily consist of my own impressions of what we have learned and what has emerged from the two and a quarter days of discussions and talks that we have had at this Colloquium. I hope that the impressions that I have formed will coincide with those of a considerable number of you, though I have no doubt that there will be some, I hope only a minority, who will disagree with the conclusions to which I have come.

I think we want to remember that one of the main functions of the Comité Maritime International, since its foundation some 85 years ago, has been to promote uniformity in Maritime Law. Not uniformity for its own sake, but uniformity which will facilitate international trade, reduce the costs of sea transport and what is equally important if trade is to be carried on successfully, will bring as much certainty into it as possible so that those taking part in it know where they stand, what obligations they have to fulfil and what risks they run. We are concerned with uniformity of application as far as possible throughout the trading world and that means that the same facts ought to give rise to the same consequences in all the different jurisdictions in which the matter may fall to be decided by the courts.

Uniformity of substantive law, of course, helps and helps enormously. However, uniformity of substantive law does not necessarily ensure uniformity of application in all jurisdictions. Indeed, complete uniformity of application is an ideal which can never be achieved. The national approach of the judiciary varies from country to country and the judicial approach varies from judge to judge. There is, therefore, always a margin of variation which will bring different results in different countries and different results in different courts in the same country. One of the purposes which we should have at the centre of our considerations of substantive law is to reduce the scope of these variations to the minimum.

The Hague Rules gave a large measure of uniformity of substantive law throughout a considerable portion of the world. The Visby Protocol has had, at any rate temporarily, the effect of introducing some variation between those countries which have acceded to it and those which have not, but the principles of the Hague Rules and those of the Visby Protocol do not differ essentially. Certainly there have been variations in the interpretation of what is required to discharge the obligation to exercise due diligence under the Hague Rules and, as Mr. Goldie stated in his paper those different interpretations seem to have increased within the last ten years or so. It may be that that reflects the reluctance of judges to allow shipowners to escape vicarious liability for the faults of their servants and agents in the navigation and management of the ship.

There is no novelty for persons concerned in maritime trade to have two different regimes applying. We have lived with this for very many years with the Hague Rules which whilst they apply to the trade in the greater part of the world, still leave important trading countries, for example South America and certain countries in the Middle East, where they do not apply. So long as a substantial proportion of world trade is governed by a uniform rule of substantive law then we can live with the existence of concurrent systems in some parts of the world. But what is essential is that it should be a substantial proportion that is dealt with under the uniform system.

I think we want to remember too that we can purchase uniformity of substantive law at too high a price. If the law which we are going to make uniform is going to increase the costs of sea transport substantially and, particularly, if it does not lead to uniform application then we may be paying too high a price for uniformity.

We, at this Colloquium, are confronted by a choice of two practical alternatives. One is to accept a division of the world into countries which are applying concurrently two different systems, or more than two different systems, of substantive law. Many developing

countries may accept the Hamburg Rules and we should consider what would happen in practice if some, or most, industrialised and maritime nations concerned with the greater part of world trade were to continue to adhere to the Hague Visby Rules. The other alternative is that the industrialised and maritime nations of the world should go over to the Hamburg Rules so that there would be a uniform code applicable over the greater part of world maritime trade.

I think one of the conclusions that we have reached is that it is possible for any country to adhere to one system, either the Hague Visby Rules or the Hamburg Rules, or to adhere to neither. What is not possible however is that they should at the same time adhere to both despite the suggestion made in Article 31(iv) that a country may continue to apply the Hague Rules and the Hamburg Rules at the same time.

So, there we have the choice, and the purpose of this Colloquium has been two-fold. To consider what would be the practical effects of adopting one system or the other, particularly, because it is novel, what would be the practical effects of adopting the Hamburg Rules. We are not qualified to express views about the political desirability of either course. That is for governments. But we have here a gathering of practical experts who know how maritime trade and maritime insurance is operated. We are in a position, perhaps better than governments, to point out what the practical effects are likely to be, because, though that may not be the main consideration which will actuate governments in the course they propose to take, it is obviously a factor which they will have to bear in mind. We, in the CMI, can give assistance to them in evaluating, not the political factors but what the effects on the economics of world maritime transport are going to be.

The other purpose of this Colloquium was that we should identify difficulties and uncertainties in the application and interpretation of the Hamburg Rules. Inevitably, there will be difficulties and uncertainties. What we have sought to do is not to look critically at the draftsmanship of the Hamburg Rules but to consider what matters of doubt there are and to make suggestions as to how those matters should be, and we hope will be, resolved. This is because, and here perhaps I might refer to Article 3, it is desirable that uniformity of interpretation and application should apply in all jurisdictions. We have at this Colloquium lawyers familiar with the law of many jurisdictions which gives us an opportunity of seeing if we can get consensus of opinion among them as to how particular doubtful provisions should be construed. I would hope that the Group Reports will be of assistance not only to governments who are going to make up their minds as to whether to move from the Hague Visby to the Hamburg Rules and not only to those of you, the practical men, who will have to organise their affairs if the Hamburg Rules are adopted, but also to the courts of the world which will have, in due course, to interpret and, it is to be hoped, to interpret uniformly in each of the jurisdictions those provisions which give rise to doubt.

We have tended to concentrate, and rightly, on the basic change between the Hague Visby and the Hamburg Rules in the allocation of the risk of loss or damage to cargo in the course of sea transport as between the shipowner and the cargo owner. That is the change which will cause the main economic consequences, but there are other departures in the Hamburg Rules which, perhaps, deserve pinpointing because they give rise to legal problems as apart from distinctly economic problems.

First, may I just try to summarise what it seems to me is the difference between the philosophy or principles of the Hague Rules and the Hamburg Rules on allocation of risk. I would seek to do it only in a sentence. Under the Hague Rules what I may call misfortune risks, to cargo, those which arise without the fault of either party, the shipowner or the cargo owner, are borne by the cargo owner. The justification for this is that misfortune risks to the ship are borne by the shipowner. So far as concerns human error risks, those which result from faults in human judgment the Hague Rules, largely as a matter of history perhaps, adopted the compromise that human error risks by the shipowner before the voyage lay upon the shipowner and human error risks in general during the voyage, nautical fault and fire, were borne by cargo.

The cost of the risk, in the end has to be borne by the cargo owner, the exporter, the

importer, the consumer of the transported goods, whether it is put in the first instance on the cargo owner or on the shipowner; because unless shipowners are to go out of business the cost is going to be paid for ultimately in cargo insurance or in freight. In a highly competitive market, and one must remember that the highest proportion of world trade is not liner trade but tramp trade, it may take some time for the effect to work through into freight, but, inevitably, it must do so unless shipowners are to go out of business or unless governments are prepared to subsidise their shipowners – a concealed subsidy to the consumers of the goods.

The reason for this allocation under the Hague Rules is that it was considered the most economical way of dealing with the risks by spreading them over both cargo and P & I underwriters rather than by putting all the risks upon a P & I Club. It also provided sufficient incentive to the shipowner to take economic steps to avoid the loss. Further, when one bears in mind that it is only transport evidenced by bill of lading, to which the Hague Rules apply, the fact that one finds the same regime adopted voluntarily in charterparties and in other contracts to which the Hague Rules do not necessarily apply is some indication that the market found it the most economical way of apportioning these risks.

The Hamburg Rules philosophy, on the other hand, is to allocate all the human error risks on the voyage as well as pre-voyage to the shipowner and to go further because of the onus of proof point, to allocate to the shipowner all risks unless he is able to satisfy the court that there was really nothing that he could have done to avoid them. One sees, perhaps, behind that philosophy the feeling that the ordinary law of tort makes the employer vicariously liable for the error of his servants and agents and why should it be different when it comes to maritime transport? That is the theoretical argument and it is a very understandable argument. But one has to measure it against the practical effects in costs and certainty in moving from one system to another.

Two other differences in philosophy I think are worthwhile pinpointing. The first is that the Hague Rules, drafted originally in the 1920s, really accepted the doctrine of freedom of contract between negotiating parties. It was only in the bill of lading case, where the party bound by the contract to whom the bill of lading was negotiated might have had no voice, no negotiating power, that the Hague Rules said then these terms which you could not negotiate will be the standard terms so that everyone will know where they stand.

The Hamburg Rules philosophy over 50 years later, not surprisingly, has abandoned the principle of freedom of contract between negotiating parties because with the exception, the somewhat illogical exception, of charterparties the Hamburg Rules apply compulsorily to all contracts of carriage by sea. I mention that and make no comment on it, but it is worthwhile, I think, recognising the differences in philosophy.

I come now to the final difference. The Hague Visby Rules adopted the general accepted principles of private international law. I say generally accepted, though of course they vary a little from state to state, from nation to nation. The Hague Visby Rules contain no provision about either the proper law of the contract or jurisdiction and therefore do not disturb the commonly accepted rules on these two matters. The Hamburg Rules, on the other hand, particularly in their application to inbound cargo and in their provisions on jurisdiction modify the ordinarily accepted principles of private international law and this will inevitably lead to considerable difficulties and doubts of interpretation in various jurisdictions. That is another matter which is going to have an effect which is worth noting and will not be inconsiderable.

To revert to the apportionment of risk – what conclusions have we reached as to the practical effects of adopting the Hamburg Rules? The impression that I have is that one can state these conclusions quite briefly. First, the Hamburg Rules will have no appreciable effect upon the amount of loss and damage to cargo which occurs in maritime transport. The Hague Rules provide enough inducement to shipowners to take what precautions lie within their power; the market and the economic consequences deal with that. I do not think any but a small minority have any optimism that the Hamburg Rules will reduce the

cost of sea transport by reducing the amount of loss or damage caused. So, it does not look as if there is going to be any economic saving in reduced loss and damage by moving over to the Hamburg Rules.

The second conclusion which, I think, was reached was that adoption of the Hamburg Rules will not diminish the need for cargo insurance and that, for a number of practical reasons. Cover will be needed for the period of transport in which the goods are not in the charge of the shipowner and so not his liability. Cover will be needed for excepted perils, the misfortune risks and those cases where the shipowner can show that the cause was misfortune risk. Cover will be needed to meet any excess over the Hamburg Rules limits and over the global limits under the Limitation Convention of 1976, or the earlier Convention of 1956, because limitation is going to operate more frequently in cases of total loss by collision and by stranding when cargo will come into the limitation fund in competition with the others.

The third conclusion, and one cannot put any figure to this, is that the adoption of the Hamburg Rules will lead to some increase in the costs of sea transport rather than to any diminution and this for three reasons. One is because the spread between cargo insurance and P & I insurance, which was secured by the Hague Rules, has been reduced and the cost of insuring the larger risk on the one keel by indemnity insurance is likely to mean that the reduction in cargo premiums, whatever it may be, will not match the increase that there will have to be in P & I premiums.

The second reason is this. There will inevitably be more recourse actions by the cargo insurer or the self-insured shipper against the ship. I said "actions"; I ought perhaps to have said claims because most of these are settled except perhaps in the total loss cases. But, to deal with claims, to settle claims, involves administrative costs and employing personnel and this doubly because the cargo insurer, or the self-insured shipper, has to run his claims department to talk to the claims department which the P & I Club has to run as well and when you come to actions which cannot be settled then there is a very considerable increase in costs. Again, one cannot put a figure to this but it is not a matter that can be ignored for it is clear that although cargo insurers may be able by recourse actions to reduce their liability for loss their overheads will not be correspondingly reduced, indeed, on the contrary, they will be increased.

The third reason is this and this applies to the shipowner rather than to his insurer, that he will have to provide the documentation and the evidence relating to the recourse claims.

We did not find it possible and I do not suppose anyone would wish to attempt to do so, to establish the sort of order of this increase in cost due to the three factors to which I have referred, but increase in costs there will be.

Having dealt with the costs, the next practical effect that I think has emerged from this Colloquium is that for an appreciable period after moving to the Hamburg Rules there will be considerable uncertainty as to their interpretation. Uncertainty is always an undesirable factor in the practical working of any trade and involves the cost, which is far from inconsiderable, of litigation to achieve an answer to these points of doubtful interpretation. After all, there were 50 years of jurisprudence on the Hague Rules. There were many points of doubt to begin with and they had to be solved. Most of the doubts concerning interpretation have been solved; so we do not have the renewed expense that there will be in discovering the interpretation which will be adopted of the doubtful points under the Hamburg Rules which are dealt with in the Group Reports. It is worthwhile remembering, that despite all efforts we have made, or all efforts anyone else may make, in order to achieve uniform interpretation we shall have to get this matter solved in a number of different jurisdictions.

It was suggested in the course of the Colloquium that there is a great deal to be said for this, that it would be a good idea for cargo insurers and P & I Clubs to arrange as soon as possible after the Hamburg Rules come into force to have a test case on some of the more

doubtful points in order to get a decision of the courts so that one would know where one stood. But difficulties surround this suggestion. For example, in what jurisdiction do you bring the test case? I suspect that it will have to be brought in a number of different countries. And I would add this; I have talked about difficulties of interpretation and doubts of interpretation which we have done our best to limit. There are also going to be, and we have found no solution to this, doubts about jurisdiction because of the departure of the Hamburg Rules from what have hitherto been generally accepted as the rules of private international law.

The next point, uniformity of application, we are confronted with a new formula. There has been a very helpful paper by Group 2 about how that formula is likely to be interpreted, what assistance can be gathered from the due diligence provisions and decisions under the earlier rules. But it is recognised, and speaking as one who has been a judge for now well over 20 years, it is quite plain that in the new formula, or the two new formulae if you add the "Common Understanding", there is wide scope for different decisions by individual judges and by individual jurisdictions as to what amounts to "taking all steps reasonably required", "presumed fault or neglect". This does not fall under the heading of interpretation, it comes within application. It has been difficult enough to get uniform application of a due diligence provision in the Hague Rules after all these years. I think it is going to be more difficult to get uniformity under the Hamburg Rules formulae.

Let me try and summarise what I think has emerged from this Colloquium as to the effect of the general adoption by governments of the Hamburg Rules in place of the Hague Visby Rules. To do so would have or is likely to have three practical consequences. First, it will involve some, perhaps small, overall increase in the cost of sea transport. Though it is difficult to put a figure on it an increase there will be but do not let us exaggerate it. This will have to be met by exporters and importers of goods in increased freight rates under market forces.

Second, it is not likely in the long run to lead to real uniformity of application in the various jurisdictions. One hopes for it but I think experience in other cases where there are wide expressions such as are contained in the Hamburg Rules shows that it is not attainable. So, one of the purposes of uniformity, which is to avoid the inconvenience and uncertainty of forum shopping is unlikely to be achieved under the Hamburg Rules.

Third, there will be a considerable period of uncertainty on important matters of interpretation. On that we have done our best to help but certainly we have not eliminated the difficulties.

Finally the insurance market and the freight market in the industrial and maritime countries can, no doubt, adapt themselves to the Hamburg Rules if the Hamburg Rules are to come generally into force.

Broadly speaking that would be the consequence of adoption. Perhaps less horrifying than at any rate I had thought would emerge from this Colloquium when I came here on the first day.

Let us then turn to the other alternative. What would be the effect of a refusal on the part of the countries whose nationals are represented here to replace the Hague Visby Rules by the Hamburg Rules? This would inevitably give rise to conflicts which would be regrettable, but experience has shown that it is supportable, as it has been supported for all these years under the Hague Rules, provided that a substantial part of the world trade between maritime countries is between countries that follow the same regime. But, if the greater part of the world trade was between countries which had acceded to the Hamburg Rules, the effect of minorities standing out would, and I think this is the general consensus though there were some who did not agree, lead to conflicts and uncertainty less supportable than adopting throughout the whole world, or as near as one can, the Hamburg Rules. There comes a moment when to stand out as a minority is going to lead to collisions much less acceptable, much more disturbing practically to maritime trade than to accept whatever disadvantages there may be of moving from the Hague Visby regime, which may be thought to have worked well, into the Hamburg regime.

The choice of governments as to which line they are going to follow is going to be influenced, I think mainly though perhaps not exclusively, by political considerations and those are not for us. All that it is for us to do, because in weighing political considerations one must throw into the balance, or at any rate provide the material for throwing in the balance commercial considerations, is to suggest what the practical effects will be of adopting one choice or the other. At this point let me make it plain that in summarising the conclusions which I have reached they are my conclusions. I think they probably have the support of a considerable number present. I would not be prepared to say with confidence that they represent a consensus, but I think, since I am giving my summing up it might be useful for me to say under five heads the conclusions which I have reached as to the practical consequences of accepting one or other of the only two choices which lie open.

The first is this. If only practical considerations were relevant and not political, the Hague Visby Rules for the various reasons I have given, if one could retain them, would be preferable purely from the practical point of view to moving over to a new regime. Second, if it be decided to move over to the Hamburg Rules then the maritime trade of the world, though it may not welcome it very much, could certainly adjust itself and live with that regime. Third, world maritime trade could also live with concurrent systems provided that a very substantial part of seaborne trade was, and continued to be, between countries which accepted and retained the Hague Visby Rules. Fourth, if and when a substantial part of world maritime trade is either to or from countries which have adopted the Hamburg Rules and denounced the Hague Visby Rules then the practical consequences of continuing in a minority to adhere to the Hague Visby Rules would, in my opinion and this I think was the opinion of many as the result of our debates, would be less advantageous, more harmful to world trade than going over to the Hamburg Rules. And that, I think, leads to a final practical consideration. Any interim period with some countries adhering to the Hague Visby Rules and other countries to the Hamburg Rules should be kept as short as possible. It is, therefore, preferable that there should be concerted action among the states concerned so that instead of going in one by one over a long interval of time we see, so far as possible, that if it takes place at all it does so with the majority of states as near as possible at the same time.

